

THE ICC AND THE CASE OF SUDAN'S OMAR AL BASHIR: IS PLEA-BARGAINING A VALID OPTION?

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INTRODUCTION

On July 14, 2008, Luis Moreno-Ocampo, the Prosecutor for the International Criminal Court (ICC), ignited a firestorm in international law and politics when he applied to the Court's Pre-Trial Chamber III for the issuance of an arrest warrant against the President of Sudan, Omar Hassan Ahmad al Bashir, based on ten counts of international crimes ranging from genocide, to crimes against humanity, to war crimes.¹ Al Bashir's case, arising from the UN Security Council's submission of the "situation" in Darfur to the ICC,² has created more than the usual divisions between those who approve and those who disapprove of actions under universal international criminal law. The seemingly simple consideration that the undeterred Prosecutor is merely "doing a judicial case"³ turns out to be

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¹ Details of the warrant can be found in the statement provided by the ICC Prosecutor Luis-Moreno Ocampo. See Luis Moreno-Ocampo, ICC Prosecutor, Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest Under Article 58 Against Omar Hassan Ahmad Al Bashir (July 14, 2008) [hereafter Prosecutor's Statement], available at http://www.chgs.nl/01_update_pages/documents/ICC-OTP-Statement-140708.pdf. For the official summary of the application of the Prosecutor to the Pre-Trial Chamber III regarding the situation in Darfur, Sudan, see Summary of the Case: Prosecutor's Application for a Warrant of Arrest under Article 58 Against Omar Hassan Ahman Al Bashir [hereafter Summary of the Case], available at <http://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>. For background on the conflict in Darfur, see Amnesty International: Eyes on Darfur, <http://www.eyesondarfur.org/conflict.html> (last visited May 1, 2009).

² See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, Resolution 1593 (2005) Adopted by Vote of 11 in Favour to None Against, with 4 Abstentions (Algeria, Brazil, China, United States), U.N. Doc. SC/8351 (Mar. 31, 2005) [hereafter Press Release, Security Council], available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

³ Prosecutor Moreno-Ocampo appeared to be oblivious to the concern that his application for indictment of al Bashir would cause further aggravated violence in Darfur, and create problems for peacekeeping troops and relief agencies. "I am a prosecutor doing a judicial case" he stated, according to the Associated Press. Mike Corder, *Sudanese President Charged with Genocide in Darfur*, ASSOCIATED PRESS, July 14, 2008, available at

much more complicated. Numerous questions have arisen: Are there any problems with the alleged lack of immunity of the head of a non-member state to the ICC? Will this formal prosecution help or hinder the fragile peace process in Sudan? Will it cause turmoil in the already spiked relations between the West and the African continent? Why are the African Union and the Arab League considering this act a “political” rather than a “legal” one? Will their support of the Sudanese President tarnish the reputation and fatally impair the effectiveness and, ultimately, independence of the Court? Will the Security Council step in and stop the prosecution? Then, the key issue: Will President al Bashir ever stand trial? If so, with what outcome?

In the middle of this heated discussion, this paper is approaching the problem from a slightly different angle: it considers calling into play Article 65, *Proceedings on an Admission of Guilt*, of the Rome Statute,⁴ in order to assess whether it could help in the case of al Bashir by potentially reconciling the goals of international criminal law and the needs of the political process, by working on a negotiated justice.

Upon presenting the case at issue, this paper will first look into the most common domestic form of negotiated justice, *i.e.* plea-bargaining, as developed under the U.S. common law, and contrast it with models in civil law systems. This discussion will be followed by an analysis of pertinent past trends in international criminal justice and its hybrid criminal procedure developed mostly, but not exclusively, in the jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Finally, the article will appraise these developments as they pertain to cases before the ICC and recommend a potential solution.

I. THE CASE OF OMAR AL BASHIR

A. *The Prosecutor’s Application for an Arrest Warrant*

Presenting his application to the Pre-Trial Chamber (PTC) for an arrest warrant for al Bashir, the Prosecutor noted that, in Darfur, “genocide is ongoing.”⁵ Claiming al Bashir was the mastermind behind genocide, crimes against humanity, and war crimes in this benighted region, the Prosecutor added that forces under al Bashir’s “absolute control” perpetrated such

<http://www.law.com/jsp/article.jsp?id=1202422961798>.

⁴ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, 2187 U.N.T.S. 90 [hereafter Rome Statute], available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf. At the time of writing this paper, the Rome Statute has been ratified by 106 states. See ICC Home Page, <http://www2.icc-cpi.int/Menu/ICC/About+the+Court/> (providing that 120 members have ratified Rome Statute).

⁵ Summary of the Case, *supra* note 1.

crimes.⁶

He saw the green light for the Court to move forward with bringing charges, noting that the Court had jurisdiction over Sudan through Security Council Resolution 1593 of March 2005.⁷ Additionally, the Prosecutor was not concerned with satisfying Article 17 of the ICC because these charges would not interfere with state proceedings.⁸ No national proceedings on these crimes have been initiated in Sudan and the Sudanese government has consistently refused to investigate allegations of such crimes committed by its high-ranking officials.

In order for the PTC to issue an arrest warrant against a person, the Prosecutor only needs to convince the PTC that there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”⁹

The charges brought up in the Prosecutor’s application are not definitive, as they can be changed in the course of further Court proceedings until the accused is brought to trial.¹⁰ However, the Prosecutor is still required to indicate them in detail. According to the Prosecutor, al Bashir bears criminal responsibility for:

genocide under Article 6 (a), killing members of the Fur, Masalit and Zaghawa ethnic groups, (b) causing serious mental harm, and (c) deliberately inflicting conditions of life calculated to bring about their physical destruction in part;

⁶ *Id.*

⁷ Press Release, Security Council, *supra* note 2.

⁸ According to Article 17 the ICC will only be allowed to exercise its jurisdiction if the state with competing jurisdictional claims is “unable or unwilling” to prosecute the offender. A good discussion on the principle of complementarity can be found in John T. Holmes, *Complementarity: National Courts versus the ICC*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 667 (Antonio Cassese et al. eds., Oxford Univ. Press 2002). Rome Statute art. 5 is based on the content of paragraph 10 of the Rome Statute’s Preamble which emphasizes “that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,” as well as Article 1 which sanctions the same.

⁹ Rome Statute art. 58(1)(a). Upon surrender of the person to the Court, the PTC will hold a hearing to determine whether there is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged,” and if this question is answered in the affirmative, “confirm” these charges and “commit the person to a Trial Chamber for trial on the charges as confirmed.” Rome Statute art. 61(7).

¹⁰ Until the trial starts, the Prosecutor may amend those charges with permission of the PTC and after notice to the accused. Rome Statute art. 61(9). If charges are added, a further confirmation hearing is required. *Id.* See also Marko Milanovic, *ICC Prosecutor Charges the President of Sudan with Genocide, Crimes Against Humanity and War Crimes in Darfur*, 12:15 ASIL INSIGHTS (2008), <http://www.asil.org/insights/2008/07/insights080728.html>.

crimes against humanity under Article 7(1), including acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture and (g) rapes; and

war crimes under Article 8(2)(e) for intentionally directing attacks against the civilian population(i) and pillaging(v).¹¹

The Prosecutor gave reasons for each of his charges. In the charge of genocide, the Prosecutor was challenging the January 2005 Report of the United Nations Commission of Inquiry, which had concluded that the Sudanese government's policy lacked the requisite genocidal intent.¹² The Prosecutor stipulated that recent evidence showed that al Bashir had chosen rape, hunger and fear as an "efficient method of destruction," camouflaging genocide "in the face of international scrutiny."¹³

He further claimed that systematic rape, an act that constitutes a crime against humanity, is used as a weapon of war in Darfur. He emphasized that "[s]eventy-year-old women, 6-year-old girls are raped,"¹⁴ and quoted a Darfuri victim as saying, "when we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped – gang-raped. Maybe around 20 men rape one woman. These things are normal for us here in Darfur. They rape women in front of their mothers and fathers."¹⁵ Bringing up further grounds that effectuate crimes against humanity, he concluded, "Al Bashir does not need gas chambers, bullets or machetes. This is Genocide by attrition."¹⁶ Reminding the world that there is no more time to defer action, Moreno-Ocampo observed that the international community had "failed in the past, failed to stop Rwanda genocide, failed to stop Balkans crimes." He built his case for immediate action stressing the urgency of *now* to prevent the slow death of 2.5 million Darfuris.¹⁷

The actual prosecution of crimes in Darfur started in May 2007 with the issuance of arrest warrants for two Sudanese leaders suspected of war crimes, Ahmed Harun, State Minister for Humanitarian Affairs, and the militia commander, Ali Mohamed Ali Abdel-Rahman, a.k.a. Ali Kushayb.¹⁸

¹¹ See Summary of the Case, *supra* note 1, ¶ 62.

¹² The International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, delivered to the Secretary-General* (Jan. 25, 2005) [hereafter *Report on Darfur*], available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

¹³ See Prosecutor's Statement, *supra* note 1.

¹⁴ Corder, *supra* note 3.

¹⁵ See Prosecutor's Statement, *supra* note 1.

¹⁶ *Id.*

¹⁷ Corder, *supra* note 3.

¹⁸ Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") & Ali Muhammad Ali Abd-

The Sudanese government has consistently refused to hand over the two accused.¹⁹ However, under the recent developments of al Bashir's possible indictment, tables seem to have turned. Deng Alor, the Foreign Minister of Sudan recently noted, "[e]verything short of the presidency is on the table."²⁰ Perhaps such a statement would include bringing Ahmed Harun and Ali Kushayb to justice.

The effect of arrest warrants issued by the ICC is that INTERPOL issues so-called Red Notices for fugitives wanted by the Court.²¹ Such notices trigger immediate arrest, should the indicted cross an international border.

B. Reactions inside Sudan

1. President Omar al Bashir

On July 23, 2008, nine days after the ICC Prosecutor applied for his indictment on genocide charges, President al Bashir was seen dancing on a platform in El Fasher, Darfur, the scene of his alleged crimes. El Fasher is where, in 2003, rebel groups blew up government planes initiating a bloody conflict that has already claimed over 300,000 lives and displaced approximately 2.7 million people.²² Through well-orchestrated rallies, al

Al-Rahman ("Ali Kushayb"), ICC No. ICC-02/05-01/07-2, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>; Prosecutor v. Ahmad Harun & Ali Kushayb, ICC No. ICC-02/05-01/07-3, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279858.PDF>.

¹⁹ Both "remain at large in the Sudan. Ahmad Harun continues to serve as Minister of State for Humanitarian Affairs in the Government of AL BASHIR," and the Government of Sudan has "ceased all cooperation with the prosecution." See Summary of the Case, *supra* note 1, ¶ 65.

²⁰ Lydia Polgreen & Jeffrey Gettleman, *Sudan Rallies Behind Leader Reviled Abroad*, INT'L HERALD TRIB., July 28, 2008, http://www.nytimes.com/2008/07/28/world/africa/28sudan.html?pagewanted=1&_r=1&sq&st=nyt&scp=2.

²¹ As INTERPOL explains, "[t]hese red notices allow the warrant to be circulated worldwide with the request that the wanted person be arrested with a view to extradition. . . . The persons concerned are wanted by national jurisdictions (or the International Criminal Tribunals, where appropriate) . . ." available at <http://www.interpol.int/Public/Wanted/Default.asp>. INTERPOL's website presently features seven persons for whom arrest warrants have been issued by the ICC. See INTERPOL, <http://www.interpol.int/Public/Wanted/Search/SearchWantedBy.asp?WANTEDBY=ICC> (last visited May 1, 2009).

²² CNN quoted John Holmes, the United Nations Emergency Relief Coordinator in Sudan, as stating that more than 300,000 are estimated to have died, either through direct combat, malnutrition or disease, and another 2.7 million others have been displaced from their homes since 2003. See *U.N.: 100,000 More Dead in Darfur Than Reported*, CNN, Apr. 22, 2008, <http://www.cnn.com/2008/WORLD/africa/04/22/darfur.holmes/index.html>.

Bashir challenged the looming indictment attempting to show that he enjoys support even in the region of concern. He expressed condolences to the peacekeepers, though, not so long ago, he had threatened to turn Darfur into a graveyard of “blue helmets.” He did not throw slurs to the West, and he did not invoke jihad.²³ He reminded his people, “Whenever we take one step forward toward peace, our outside enemies pull us back.”²⁴

2. The Sudanese Government

The Sudanese government and parliament have rejected the jurisdiction of the Court, and have labeled the Prosecutor as being politically motivated in filing the charges.²⁵ They are unpersuaded by Moreno-Ocampo’s reasoning that he is attempting to prevent the slow deaths of some 2.5 million displaced Darfuris. The Darfuris who Moreno-Ocampo is seeking to protect remain under attack from government-backed janjaweed militia,²⁶ even within the camps for the internally displaced, where they have been grouped for many years now. One day before the Prosecutor’s official application, the National Congress Party, al Bashir’s ruling party, threatened “violence and blood” as a reaction to the possible indictment of their President.²⁷ Simultaneously, the government is trying to turn this situation around to its advantage by harvesting domestic support in condemning the ICC acts as foreign interference.²⁸

Additionally, the National Congress argued that issuing the arrest warrant endangered vital peace negotiations, and would “motivate the armed groups to show more boldness and insolence and raise the ceiling of demands.”²⁹ Not only is the current Sudanese government opposing al Bashir’s prosecution, but they also continue to “reject all the charges old and new,”³⁰ thus holding firm to their position of non-cooperation with the

²³ Jeffrey Gettleman, *Sudanese Leader Mounts Charm Offensive*, N.Y. TIMES, July 24, 2008, at A6, available at <http://www.nytimes.com/2008/07/24/world/africa/24sudan.html>.

²⁴ *Id.*

²⁵ Corder, *supra* note 3.

²⁶ *Id.* The Prosecutor had also noted that by targeting camps al Bashir’s forces “do not need gas chambers, because the desert will kill them.” *Id.*

²⁷ Corder, *supra* note 3 (citing to report issued by Sudan State TV).

²⁸ Alexandra Hudson, *Will Bashir Evade Justice?*, REUTERS, July 15, 2008, available at <http://www.thestar.com/News/World/article/460250>.

²⁹ *Sudan's Parliament Warns Al-Bashir's Indictment May Worsen Darfur Crisis*, ASSOCIATED PRESS, July 16, 2008, available at <http://www.iht.com/articles/ap/2008/07/16/news/Sudan-War-Crimes.php>.

³⁰ *Arab Nations 'Agree Sudan Action'*, BBC NEWS, July 19, 2008, available at <http://news.bbc.co.uk/1/hi/world/africa/7515844.stm> (according to BBC, Sudan’s Minister for Foreign Affairs, Al Sammani al-Wasila, told AP news agency right after Arab League meeting of July 19, 2008, that “[w]e reject all the charges old and new.”).

Court.

Through their president Fathi Khalil, a strong supporter of the ruling party, Sudan's Bar Association interpreted Moreno-Ocampo's decision not as a legal decision, but rather as a political one. Moreover, Khalil claimed the indictment was not binding on Sudan, since Sudan is not a party to the ICC. According to him, not even the UN Security Council has the right to refer a non-member state to the jurisdiction of the ICC.³¹

3. The Sudanese Opposition

The rebel group in Darfur known as the Sudanese Liberation Movement-Unity was excited by the ICC's decision. Believing it would "galvanize resistance," they expressed readiness to offer assistance in arresting and handing over any of the indicted war criminals in Sudan to the Court.³²

The same statement was made by the representatives of another rebel group in Darfur, the Justice and Equality Movement (JEM), known to be the most powerful military faction,³³ who added that "this decision will put Bashir in a corner and will help us now to overtake this regime."³⁴ JEM went even further, asking for an interim government since, according to them, the indictment had already "eroded al Bashir's legitimacy" and had created "a new reality."³⁵ In retaliation, Sudan's special courts responded by sentencing to death by hanging eight JEM rebels on charges related to a May 10 attack on the capital.³⁶

Support for al Bashir's indictment also came from the former prime minister of Sudan, Saddiq al Mahdi, who, in 1989, was removed from power as Sudan's last elected leader in a *coup d'état* led by al Bashir. Al Mahdi

³¹ Corder, *supra* note 3.

³² See Hudson, *supra* note 28. See also Corder, *supra* note 3.

³³ Back in May 2008, Justice and Equality Movement (JEM), one of several rebel groups in Sudan, an organization led by Khalil Ibrahim, launched an attack and seized control of Omdurman, just outside of the capital Khartoum, the closest that a rebel group has ever been to the capital. Experts say that they are backed up by Chad, at a time when both Chad and Sudan are waging a proxy war through their representative rebel groups, in order to achieve their military objectives. See *Sudanese Rebels 'Reach Khartoum,'* BBC NEWS, May 10, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7394033.stm>. See also Hamza Hendawi, *Indictment is Biggest Test for Sudanese Leader,* ASSOCIATED PRESS, July 20, 2008, available at <http://abcnews.go.com/International/wireStory?id=5412466>.

³⁴ Hudson, *supra* note 28.

³⁵ *Darfur JEM Proposes an Interim Government to Deal with Sudan's "New Reality,"* SUDAN TRIB., July 21, 2008, available at <http://www.sudantribune.com/spip.php?article27961>.

³⁶ *Sudan Sentences Eight JEM Rebels to Death for Capital Raid,* SUDAN TRIB., July 29, 2008, available at <http://www.sudantribune.com/spip.php?article28069>.

expressed deep concern about the present situation in Sudan and described it as “pregnant with trouble.”³⁷

Less partisan experts, such as Hamza Hendawi, a political scientist at the University of Khartoum, assessed that charges would “pose a threat to the entire country” because a power vacuum would form that would be too tempting for many destabilizing forces.³⁸ Hendawi posits that even Al Qaeda could potentially return to Sudan if al Bashir’s government falls.³⁹

C. Reactions by the International Community

1. The UN Security Council

In 2005, the Security Council sponsored an International Commission of Inquiry on Darfur (Commission), which, in a 176-page report, concluded that the government of Sudan had not pursued a policy of genocide, but rather, “counter-insurgency warfare.”⁴⁰ According to the Commission, there was no proof that the government’s policy evinced “a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.”⁴¹ The Commission nevertheless stated that “in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis.” Certain acts committed by the government forces and militias were, however, seen as potentially amounting to crimes against humanity, as well as war crimes.⁴²

In the report, the Security Council (SC) used Article 13(b) of the Rome Statute, according to which situations considered to threaten international peace and security could be authorized for prosecution by the ICC, even if a country is not a member state. In March 2005, under Resolution 1593, the UN SC, acting under Chapter VII authorized the ICC to investigate matters in Darfur.

Presently, it is up to Pre-Trial Chamber III of the ICC to decide on the Prosecutor’s application, either by challenging the legal analysis of the Commission regarding genocide in Darfur, or by simply providing sufficient proof that such acts were perpetrated after March 2005. Whatever the result may be, ensuring compliance with the Court’s decision remains a

³⁷ Polgreen & Gettleman, *supra* note 20.

³⁸ Hendawi, *supra* note 33.

³⁹ *Id.*

⁴⁰ *Report on Darfur*, *supra* note 12, ¶ 4.

⁴¹ *Id.*

⁴² *Id.* ¶¶ 3-4.

responsibility of the Security Council. The UN SC was pressured from the inside to invoke Article 16 of the Rome Statute in order to defer al Bashir's prosecution for one year, which is a renewable action.⁴³ Such a hasty act would have meant interference with the Court's jurisdiction, right after the SC had already extended such jurisdiction through Resolution 1593. Moreover, the action would have required the approval of all permanent members of the SC, something that is difficult to achieve. The United States has consistently accused Sudan of genocide, while the United Kingdom and France, both ICC member states, have strongly opposed any interference with the independence of the court.⁴⁴

However, in July 2008, difficult issues arose within the Security Council. The African Union-United Nations Hybrid Operation in Darfur (UNAMID) was set to expire on July 31, 2008, and the need to extend it for an additional year became urgent. The African Union had asked the UN Security Council to invoke Article 16 of the Rome Statute, in order to suspend the ICC's proceedings for one year. The African Union's suggestion was backed up in the Security Council by Libya and South Africa, as well as Russia and China, who insisted that the resolution on renewing the UNAMID mandate should also ask for the suspension of the ICC's proceedings. They argued that prosecuting Sudan's president would set back, and likely make impossible, peace in Darfur. After long negotiations, and strong opposition by the United Kingdom, France, the United States, and several Central American countries, the Resolution that renewed the UNAMID mandate only made notice of the African Union request for the Council to postpone the ICC's proceedings, but it did not commit the Security Council to anything further.⁴⁵ The Resolution was approved with fourteen votes. Only the United States abstained, insisting there should be no link between the mandate of the peacekeeping force and the Court's work.⁴⁶

⁴³ See *Russia Signals Support to Darfur ICC Deferral, UK Toughens Stance*, UNMIS Media Monitoring Report, Feb. 15, 2009, at 5, available at <http://www.unmis.org/english/2009Docs/mmr-feb15.pdf>.

⁴⁴ *Sudan's Bashir Could Escape War Crimes Indictment*, REUTERS, July 16, 2008, available at http://www.reuters.com/article/homepageCrisis/idUSN16459860.CH_2400 (quoting French Ambassador Jean-Maurice Ripert and British Ambassador John Sawers who stated that their countries have no intention to interfere with the ICC process, which should be independent and free of political pressure, whereas the US special envoy for Sudan is quoted to have said that "there can be no impunity" for crimes in Darfur). *Id.*

⁴⁵ *UN Extends Darfur Peace Mission*, BBC NEWS, Aug. 1, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7535297.stm>.

⁴⁶ *Id.* (quoting Alejandro Wolff, US Deputy Ambassador to the UN, who stated that "[t]he United States abstained in the vote, because language added to the resolution would send the wrong signal to the Sudanese president.").

Sudan's two strong allies in the Security Council, China and Russia, were not likely to use their veto power as permanent members to protect their close partner. Given the timing of the Beijing Olympics, it would not have been in the Chinese government's interest to use their veto power. China was already facing longstanding criticism for its human rights record. Moreover, China had no interest in highlighting its close relationship with Sudan since the BBC had recently accused China of "fueling war in Darfur" by providing weapons to the Sudanese government and by training fighter pilots in Darfur, in violation of the UN arms embargo.⁴⁷

2. Africa

South Africa has also expressed concern over al Bashir's potential indictment, noting that the "search for justice should not jeopardize the other priorities in Sudan," hinting at the stalled peace process.⁴⁸ On the contrary, however, it may be argued that the Sudanese government is actually the one responsible for the slow deployment of peacekeeping troops in Darfur. Only 9,500 out of 26,000 planned troops, soldiers, and police officers are actually operating in Sudan, mostly as the result of Khartoum picking the nationalities of its peacekeepers, and blocking non-African forces.⁴⁹

On the African continent, the regional establishments encompassing Sudan are firmly closing ranks behind it. The Arab League's foreign ministers, who met in Cairo on July 19, 2008, called the ICC move a *dangerous precedent*, which undermines Sudan's sovereignty.⁵⁰ In a joint resolution, the 22 member-states declared, "The council decides solidarity [sic] with the Republic of Sudan in confronting schemes that undermine its sovereignty, unity and stability and their non-acceptance of the unbalanced, not objective position of the prosecutor general of the Internal Criminal Court."⁵¹

As mentioned above, the African Union (AU) has also asked the UN

⁴⁷ See Hilary Andersson, *China 'Is Fuelling War in Darfur,'* BBC NEWS, July 13, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7503428.stm> for a discussion of China's strong economic ties to Sudan. Andersson notes that there are strong economic ties between China and Sudan because China is Sudan's largest buyer of oil, but also by writing off a debt of millions of dollars, while at the same time providing a multi-million pound loan, free of interest, to build a new presidential palace for al Bashir. *Id.*

⁴⁸ *Sudan's Bashir Could Escape War Crimes Indictment*, *supra* note 44.

⁴⁹ *Brown in Darfur Peacekeeping Vow*, BBC NEWS, Sept. 16, 2007, available at <http://news.bbc.co.uk/2/hi/africa/6997116.stm>. See also David Clark, *Khartoum Is No Friend of This Fresh Resolve on Darfur*, THE GUARDIAN (London), Aug. 2, 2007, available at <http://www.guardian.co.uk/commentisfree/2007/aug/02/comment.sudan>. *Sudan's Bashir Could Escape War Crimes Indictment*, *supra* note 44. *Report on Darfur*, *supra* note 12.

⁵⁰ *Arab Nations 'Agree Sudan Action,'* *supra* note 30.

⁵¹ *Id.*

Security Council to suspend any action towards al Bashir's indictment for one year. The AU Peace and Security Council, in an emergency meeting, expressed concern over Southern Sudan seceding if the peace process were interrupted by ICC action against al Bashir. After the meeting, the Nigerian Minister of Foreign Affairs, Ojo Maduekwe, further predicted that if al Bashir is arrested, "the whole place could turn into one huge graveyard."⁵²

When the UN Security Council passed Resolution 1593, referring the situation in Darfur to the Prosecutor of the ICC, the Algerian Ambassador to the UN, Abdallah Baali had abstained. He noted, "the fight against impunity had the equal goal of re-establishing harmony among the peoples of Darfur while serving the cause of peace."⁵³ He referred to the African Union as being the "best place" to ensure that an "international demarche . . . contributed towards national reconciliation, a political settlement of the crisis and the consolidation of peace and stability throughout the Sudan; and promoted the support of all Sudanese in that process, including, in particular, securing the cooperation of the Government."⁵⁴

The ICC's focus so far on African cases seems to have created tension in the relations between the AU and the ICC. A memorandum of cooperation between the AU and the ICC is not yet in place, though the UN Security Council Resolution had at that time invited "the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity."⁵⁵ The AU continues to struggle to determine the stand it will take regarding this issue.

In 2006, Geoffrey Mugumya, Director of Peace and Security Council of the African Union described the AU-ICC cooperation in the following way:

Over 40 African countries have become signatories to the Rome Statute since its promulgation in 1998. This demonstrates the growing importance attached by the continent to *holding accountable former and incumbent leaders guilty of committing crimes that fall under the ICC's jurisdiction*. Although the *International Criminal Court's involvement in national African crises has yet to be accepted by many of the continent's political elite*, the AU-ICC partnership will hopefully play a key role in the future in resolving the problems caused by widespread

⁵² Anita Powell, *AU to Seek Delay in al-Bashir Indictment*, ASSOCIATED PRESS, July 21, 2008, available at http://www.usatoday.com/news/world/2008-07-21-2084726765_x.htm.

⁵³ See Press Release, Security Council, *supra* note 2.

⁵⁴ *Id.*

⁵⁵ S.C. Res. 1593, U.N. Doc. S/Res/1593 (Mar. 31, 2005).

impunity for the most serious crimes.⁵⁶

3. The European Union

The European Union (EU) supported the ICC Prosecutor's application for an arrest warrant against al Bashir. Though veiled in diplomatic language, the EU made it clear that it left it "up to the judges of the Pre-Trial Chamber of the ICC to determine what action they intend to take in response to the request issued by the prosecutor."⁵⁷ Recognizing the fundamental role that the ICC plays in the promotion of international justice, the EU extended its request for the execution of the arrest warrants issued by the Court against Ahmed Harun and Ali Kushayb. However, it was also cautious in reaffirming "the strategic importance of the search for a political solution in Darfur and of the implementation of the North-South peace agreement (CPA)."⁵⁸ The EU also invited the "Sudanese Government of National Unity and all parties, groups and movements in Darfur to work towards those objectives, in the interests of the population of Sudan and the stability of the country and the region."⁵⁹

On July 16, 2008, on the eve of the 10th anniversary of the signing of the Rome Statute, the EU vowed "to do everything in its power to support the Court and to help ensure that all arrest warrants are swiftly enforced."⁶⁰ The EU further affirmed that it did not see peace and justice as contradictory terms, but on the contrary as "necessary components of one single solution."⁶¹ It is significant to note that France, with the presidency of the EU,⁶² and with veto power in the UN Security Council, has strongly opposed any sort of UN SC interference with the ICC's recent actions, refusing, *inter alia*, to hold hostage the renewal of UNAMID.

⁵⁶ Geoffrey Mugumya, Director of Peace and Sec. of the Afr. Union Comm'n, Keynote Speech for the Inst. for Pub. Pol'y Res. Reg'l workshop: Protection of Civilians in African Crises by Non-military Means (Sept. 14, 2006), available at <http://www.ippr.org.uk/research/teams/event.asp?id=2376> (follow "Geoffrey Mugumya presented a report on Peace, Security and the Responsibility to Protect: Policy Options for the AU's Peace and Security Council" hyperlink).

⁵⁷ *Declaration by the Presidency on Behalf of the European Union after the Communiqué of the Prosecutor of the International Criminal Court (ICC)*, July 15, 2008, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/cfsp/101806.pdf.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *EU Presidency Declaration to Mark 10th Anniversary of Rome Statute of the International Criminal Court*, July 16, 2008, ¶¶ 3-6, available at http://europa-eu-un.org/articles/en/article_8025_en.htm.

⁶¹ *Id.*

⁶² At the time this piece was authored, France was the president of the European Union.

4. The United States

Though cautious not to make any statements that would lend legitimacy to the ICC, the United States⁶³ has stood firm in its belief that genocide cannot go unpunished in Sudan. Contrary to the United Nations Commission of Inquiry's conclusion,⁶⁴ President Bush, in 2004, recognized that genocide had occurred in Darfur stating, "We urge the international community to work with us to prevent and suppress acts of genocide. We call on the United Nations to undertake a full investigation of the genocide and other crimes in Darfur."⁶⁵ In order to prevent further atrocities, at that time he also asked for a Security Council resolution authorizing an expanded African Union security force. In 2007, the U.S. government had stiffened economic sanctions on Sudan, President Bush stated, "I promise this to the people of Darfur: The United States will not avert our eyes from a crisis that challenges the conscience of the world."⁶⁶

Though consistently careful not to show support for the ICC, the United States abstained from the resolution that authorized the ICC to investigate the conflict in Darfur, rather than vetoing it. The explanation became clear through John Bellinger, the State Department's top legal advisor, who stated, "As a matter of policy, not only do we not oppose the ICC's investigation and prosecutions in Sudan but we support its investigation and prosecution of those atrocities."⁶⁷

Indeed, after Moreno-Ocampo asked for the arrest warrant against al Bashir, the White House spokesperson reacted by saying that such charges actually recognize "the humanitarian disaster and the atrocities that have gone on there." As to the ICC, he considered it "a separate matter."⁶⁸

5. Human Rights Organizations

Human Rights Watch welcomed the charges. Richard Dicker, director

⁶³ See generally John Cerone, *Dynamic Equilibrium: The Evolution of the U.S. Attitudes Toward International Courts and Tribunals*, 18 EUR. J. INT'L L. 277 (2007) (discussing ideological considerations, attitudes, and dynamics of relationship between U.S. and international criminal courts).

⁶⁴ *Report on Darfur*, *supra* note 12, at 4.

⁶⁵ Press Release, George W. Bush, President of the United States, President's Statement on Violence in Darfur, Sudan (Sept. 9, 2004), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040909-10.html>.

⁶⁶ Michele Kelemen, *All Things Considered: Bush Pressures Sudan over Darfur Genocide* (NPR radio broadcast May 29, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10518746>.

⁶⁷ *White House Ambivalent on Sudan Charges*, CBS NEWS, July 15, 2008, available at <http://www.cbsnews.com/stories/2008/07/15/world/main4261786.shtml>.

⁶⁸ *Id.*

of the International Justice Program, commented that “[c]harging President al Bashir for the hideous crimes in Darfur shows that no one is above the law.”⁶⁹ Other representatives have noted that the crimes in Darfur can be traced to the highest levels of power, and al Bashir should not be allowed to negotiate his way out of an indictment.⁷⁰

It has been reported that al Bashir’s indictment could go either way: cause problems to aid and peacekeeping operations, or create enough pressure to bring the Sudanese government to commit itself seriously to a course of peace.⁷¹ They further predict that al Bashir might not end up in a courtroom anytime soon.⁷² However, precedent has shown that evading justice forever is almost impossible. Serbia’s Slobodan Milošević,⁷³ Liberia’s Charles Taylor,⁷⁴ Radovan Karadžić of the “Republika Srpska,” and Ramush Haradinaj of Kosovo, who each voluntarily surrendered to the jurisdiction of the ICTY, are cases in point.

D. The ICC Pre-Trial Chamber’s Indictment and Arrest Warrant against Omar al Bashir

On March 4, 2009, Pre-Trial Chamber I of the ICC, composed of Judges Akua Kuenyehia (Ghana), Presiding Judge, Judge Anita Ušacka (Latvia), and Judge Sylvia Steiner (Brazil), decided that there were:

reasonable grounds to believe that Omar al-Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under article 25(3)(a) of the Statute, for:

- i. intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part

⁶⁹ Corder, *supra* note 3 (quoting Richard Dicker, who further added, “It is the prosecutor’s job to follow the evidence wherever it leads, regardless of official position.”).

⁷⁰ Kelemen, *supra* note 66.

⁷¹ Akwei Thompson, *Bashir Indictment Poses Opportunities and Risks For Peace*, VOICE OF AM., July 19, 2008, available at www.voanews.com/english/Africa/2008-07-19-voa13.cfm (last visited May 1, 2009).

⁷² See Hudson, *supra* note 28 (quoting Nick Grono of International Crisis Group who stated that “[i]f the court issues an arrest warrant in a month or two, it’s going to be difficult for them to get hold of Bashir unless he travels outside of the country to a country that might arrest him, or unless he loses power, there’s no likelihood in the short term that Bashir will be brought before the International Criminal Court in the Hague.”). See Thompson, *supra* note 71.

⁷³ War crimes charges against Milošević in 1999 were considered a factor in the October 2000 popular revolt that ousted him of power. See Hudson, *supra* note 28.

⁷⁴ The change in regime facilitated Taylor’s arrest. In 2003 Taylor fled to Nigeria after he lost power. The new President of Liberia, Johnson-Sirleaf, asked Nigeria to arrest Taylor and bring him to the jurisdiction of the Special Court for Sierra Leone, where he is now on trial facing charges of orchestrating violence and abuse.

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in hostilities as a war crime, within the meaning of article 8(2)(e)(i) of the Statute;

ii. pillage as a war crime, within the meaning of article 8(2)(e)(v) of the Statute;

iii. murder as a crime against humanity, within the meaning of article 7(1)(a) of the Statute;

iv. extermination as a crime against humanity, within the meaning of article 7(1)(b) of the Statute;

v. forcible transfer as a crime against humanity, within the meaning of article 7(1)(d) of the Statute;

vi. torture as a crime against humanity, within the meaning of article 7(1)(f) of the Statute; and

vii. rape as a crime against humanity, within the meaning of article 7(1)(g) of the Statute.⁷⁵

These crimes:

were allegedly committed during a five year counter-insurgency campaign by the Government of Sudan against the Sudanese Liberation Movement/Army (SLM/A), the Justice and Equality Movement (JEM) and other armed groups opposing the Government of Sudan in Darfur.

...

A core component of that campaign was the unlawful attack on that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – perceived to be close to the organised armed groups opposing the Government of Sudan in Darfur. The said civilian population was to be unlawfully attacked by Government of Sudan forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service and the Humanitarian Aid Commission.

The Chamber found that Omar al Bashir, as the *de jure* and *de facto* President of Sudan and Commander-in-Chief of the Sudanese Armed Forces, is suspected of having coordinated the

⁷⁵ Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, at 7-8 (Mar. 4, 2009) [hereafter Arrest Warrant], available at <http://www.icc-epi.int/iccdocs/doc/doc639078.pdf>.

design and implementation of the counter-insurgency campaign. In the alternative, it also found that there are reasonable grounds to believe that he was in control of all branches of the “apparatus” of the State of Sudan and used such control to secure the implementation of the counter-insurgency campaign.⁷⁶

As far as the Prosecutor’s charge of genocide is concerned, the Court’s majority:

found that the material provided by the Prosecution in support of its application for a warrant of arrest failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups. Consequently, the crime of genocide is not included in the warrant issued for the arrest of Omar Al Bashir. Nevertheless, the Judges stressed that if additional evidence is gathered by the Prosecution, the decision would not prevent the Prosecution from requesting an amendment to the warrant of arrest in order to include the crime of genocide.⁷⁷

Judge Anita Ušacka dissented from the majority’s opinion in this part; she found that there were reasonable grounds to believe that charges of genocide were warranted in this case.⁷⁸

The Chamber also issued an arrest warrant against President Omar al Bashir, considering it necessary at this stage “to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation . . . and (iii) that he will not continue with the commission of the above-mentioned crimes.”⁷⁹ This was the first arrest warrant the ICC ever issued against a sitting Head of State.⁸⁰

II. PLEA BARGAINING IN THE COMMON AND THE CIVIL LAW

In this imbroglio of political and justice considerations, it will be necessary to consider the most effective ways to balance the issues of peace and impunity. One of the possible solutions could be the application of

⁷⁶ Press Release, ICC, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan, ICC-CPI-20090304-PR394 (Mar. 4, 2009) [hereafter Press Release, ICC], <http://www.icc-cpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm>.

⁷⁷ *Id.*

⁷⁸ Partly Dissenting Opinion of Judge Anita Ušacka to the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, Part IV, cited in Arrest Warrant, *supra* note 75, at 7 n.11.

⁷⁹ Arrest Warrant, *supra* note 75, at 8 (basing itself on article 58(1) of Statute)

⁸⁰ Press Release, ICC, *supra* note 76.

negotiated justice principles, such as the plea-bargaining practice developed in the U.S. criminal justice system, practices developed in civil law countries, and the jurisprudence of international criminal tribunals. However, whether this will be a realistic and legally sound option, remains questionable.

A. Plea-Bargaining in the United States

Characteristic of U.S. criminal procedure,⁸¹ the system of plea bargaining has constantly come under attack by scholars from within⁸² and

⁸¹ Rule 11 of the Federal Rules of Criminal Procedure in the U.S. provides a detailed procedure for plea bargaining starting with the court's advising and questioning of the defendant, ensuring that a plea is voluntary, determining the factual basis for a plea, describing the procedure for the agreement of the plea, disclosing the plea, judicial consideration of the plea, acceptance or rejection of the plea by the court, rules for withdrawing the plea, and its finality. See FED. R. CRIM. P. 11 (including amendment that entered into effect on December 1, 2007).

⁸² John H. Langbein, *Torture and Plea Bargaining*, in PHILOSOPHY OF LAW 349, 352 (Joel Feinberg & Hyman Gross eds., Wadsworth Publ'g Co. 1975) (5th ed. 1995). In this legal philosophical treatise, Langbein expresses his disdain for the "spectacle of plea bargaining" in the U.S. as he compares the American law of plea bargaining to the medieval European judicial torture, a law which constituted the heart of European criminal procedure from the mid-thirteenth to the mid-eighteenth century. Drawing parallels between these two laws he discovers that they have striking resemblances in purpose and nature; though coercion in the law and practice of torture is greater than in plea bargaining, nevertheless "the resulting moral quandary is the same." He gives several arguments to support this conclusion. First, the intent of both laws is to safeguard the accused by trying to eliminate the discretion of the trier of fact: the torture law requiring the judge to adhere to objective criteria of proof, and the plea bargaining protecting the accused from the dangers of the jury trial; second, each of these laws focus on inducing the accused to confess guilt, rather than having the accusers prove it, and the coercion in both laws differs only in degree, but not in kind; third, like medieval Europeans, modern-day Americans resort to a procedural system "that engages in condemnation without adjudication;" forth, like the law of torture, the sentencing differential elicits confessions, that would not otherwise be tendered, and some of these confessions are false; fifth, in the substance of both systems lies the illusory safeguard of voluntarism — the accused respectively had and has to repeat the confession or the plea before the judge "voluntarily;" sixth, both systems enhanced their laws respectively with a "probable cause determination for investigation under torture," and the requirement of an "adequate factual basis for the plea," but these safeguards do not suffice to protect an innocent from condemnation. Langbein illustrates this point with two examples: 1) the Case of *North Carolina v. Alford* before the U.S. Supreme Court, which found it permissible to condemn without trial a person who had declared before the sentencing court: "I just pleaded guilty [of second degree murder] because they said they would gas me for it . . . I am not guilty but I plead guilty;" 2) the Case of Johannes Julius, a 17th century burgomaster of Bamberg, who wrote to his daughter, as he awaited execution, that he had pleaded guilty of witchcraft "for which I must die. It is all falsehood and invention, so help me God. . . . They never seize to torture until one says something." Langbein concludes that in addition to an increased danger of convicting an innocent man, the plea bargaining, "this willful mislabeling," reinforces the cynicism about the

outside of⁸³ the United States. There are several reasons that plea-bargaining is frowned upon, but “the resulting moral quandary,” as Langbein puts it, seems to be at the center of the controversy.⁸⁴ *Confessio est regina probationum*,⁸⁵ a maxim of the medieval Glossators, fittingly portrays the American concept of plea-bargaining.⁸⁶ It originated in the late nineteenth century and started to become visible as a non-trial procedure in the 1920s.⁸⁷ Plea-bargaining is a non-trial procedure that consists of a confession by the accused, usually to a lesser charge, in exchange for the prosecutor’s leniency with respect to the criminal sanction imposed. The prosecutor may also reduce the number of counts, and, sometimes, may even acquit the accused of all charges. Generally, it is offered by the prosecutor to the accused in cases where the crimes charged bear the widest range of sentencing options. Some scholars have stated it is less frequently used for the most serious crimes, or notorious cases.⁸⁸

There are two basic types of plea negotiation: charge bargaining and sentencing bargaining.⁸⁹ Through plea-bargaining, the accused pleads guilty and waives his right to trial, in exchange for a lesser punishment than that which he might have been sentenced to had the case been adjudicated and had the accused been found guilty. Thus, for the defense of the accused, plea-bargaining serves as an instrument of damage control, and appeases the accused with the certainty of a known outcome. It is convenient to convict the accused based on his confession, since the prosecutor is no longer

processes of criminal justice, and he opts for “a streamlined non-adversarial trial procedure,” similar to the “irresistible model” of modern European criminal procedure. For a summary of more arguments in favor and against this component of the U.S. justice system, see W.R. LAFAVE & J.H. ISRAEL, *CRIMINAL PROCEDURE* 766-72 (Student ed., Thomson West 1985 & Supp. 1987). As to recidivism concerns in plea bargaining, see Peter T. Wendel, *The Case Against Plea Bargaining Child Sexual Abuse Charges: “Déjà Vu All Over Again,”* 64 MO. L. REV. 317, 331 n.46 (1999).

⁸³ See Bohlander, *infra* note 331.

⁸⁴ Langbein, *supra* note 82.

⁸⁵ Latin for “the confession is the queen of tests.”

⁸⁶ Langbein, *supra* note 82, at 353.

⁸⁷ *Id.* at 352.

⁸⁸ See *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment, ¶¶ 4-7 (Dec. 2, 2003).

⁸⁹ For a summarized description of the two kinds of plea bargaining and the implications of the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), see Barry Boss & Nicole L. Angarella, *Negotiating Federal Plea Agreements Post-Booker: Same as It Ever Was?*, 21 CRIM. JUST. 22 (2006). *Booker* dealt with the constitutionality of the Federal Sentencing Guidelines, which were made advisory by the Court, which in turn reasoned in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”

charged with the burden of proof for the accused's guilt, and the court is spared the effort and cost of adjudicating the case. Hence, for the prosecution and the courts, plea-bargaining plays an important role in reducing judicial workload. In many cases, the prosecution bargains with less culpable defendants in exchange for facts and evidence that could help secure guilty findings of the more culpable defendants, who would potentially otherwise be acquitted. In other cases, where the facts and the law may not be clear enough to bring about a desired conviction, plea-bargaining guarantees at least a partial victory for the prosecution. A system of justice, some would argue, that relies overwhelmingly upon plea bargains to dispose of cases is built upon the "bad man" inference.⁹⁰ Some commentators thus consider plea-bargaining to be *the defining feature* of the present federal criminal justice system that circumvents "the preferred way of resolving criminal cases: a jury trial with full legal due process."⁹¹

However, if we consult the United States Constitution or its Bill of Rights, not only is there no reference to the constitutionality of plea bargaining, but we also find that several amendments contain guarantees which appear to imply the opposite. By pleading guilty without trial, the accused waives several constitutional rights provided through the due process of law, *inter alia*, the right to remain silent, the right against self-incrimination, and the right to have an attorney assist the defendant during the trial. The above-mentioned guarantees, enshrined in the Fifth, Sixth and Fourteenth Amendments, have always been seen by the U.S. Supreme Court as the basis of the U.S. adversarial system.⁹²

Still, plea-bargaining is not an exception to the rule, but has instead become a commonplace vehicle for disposition of cases in the U.S. criminal system, repeatedly upheld by the Supreme Court.⁹³ This seems to have a

⁹⁰ Michael H. Graham, *The "Mere Fact" Method of Prior Conviction Impeachment: "Bringing Some Honesty and Fairness To Being Dishonest,"* 42:4 CRIM. L. BULL. 6 (2006).

⁹¹ Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia,* 43 AM. CRIM. L. REV. 1063, 1064 (2006).

⁹² See *Nix v. Williams*, 467 U.S. 431, 453 (1984). The Court reasons that "The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process . . ." For a concise collection of cases and articles on the substance of the adversarial system in the Fifth, Sixth and Fourteenth Amendments, see Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 18 CRIM. L. REV. 625, 629 n.11(1996).

⁹³ See *Corbitt v. New Jersey*, 439 U.S. 212 (1978) (stating that "[n]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid; specifically, there is no per se rule against encouraging guilty pleas. . . . Absent the abolition of guilty pleas and plea bargaining, it is not forbidden under the Constitution to extend a proper degree of leniency in return for guilty pleas . . ."). See also *McKune v. Lile*, 536 U.S. 24 (2002), where the Court reasons that "plea bargaining does not

good reason, as it clears the busy dockets with cost-effective pleas and results in a workload reduction. In the United States, as Stephen Thaman notes, a full jury trial with all its due process guarantees is simply not affordable any longer.⁹⁴ Consequently, around 95% of cases today are solved through plea-bargaining, marking a 25% increase compared to the 1980's.⁹⁵

B. *Negotiated Justice in the Civil Law Tradition*

Firmly based on the principle of legality,⁹⁶ and adhering to the values embodied in the principle of plea-bargaining, the traditional European criminal procedure and most of its stalwart legal professionals find the bargaining of charges, as well as the reduction of sentences, to be “repulsive to their sense of justice.”⁹⁷ To the common European lawyer, “criminal law

violate the Fifth Amendment [privilege against self-incrimination], even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742, 751 (1970). Another interesting case is *United States v. Mezzanatto*, 513 U.S. 196, 209 (1995). The Court, quoting *Corbitt*, notes that “The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government ‘may encourage a guilty plea by offering substantial benefits in return for the plea.’” Then it goes on reasoning that “[w]hile confronting a defendant with the risk of more severe punishment clearly may have a “discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable” — and permissible — “attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

⁹⁴ Stephen C. Thaman, *The Role of Plea and Confession Bargaining in International Criminal Courts*, in ICTY: TOWARDS A FAIR TRIAL? 341 (Thomas Krueßmann ed., 2008).

⁹⁵ See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L. J. 857, 1012-13 (2000). See also Thaman, *supra* note 94. In many cases, though, the fundamental motive for entering into pleas is consideration for the victims of crimes — the would-be-witnesses at trial. Consider for instance, the cases prosecuting the crime of human trafficking. For background analysis and suggested solutions to this global scourge, see generally *Trafficking in Human Beings: A Global Concern*, INTERCULTURAL HUM. RTS. L. REV., Volume 1 (2006); Roza Pati et al., *Miami Declaration of Principles on Human Trafficking* (2005) (developed by a broad coalition of experts); Roza Pati, *The Miami Declaration of Principles on Human Trafficking: Its Genesis and Purpose*, 1 INTERCULTURAL HUM. RTS. L. REV. 5. (2006). See also Msgr. Franklyn M. Casale, *International Trafficking in Persons: Suggested Responses to a Scourge of Humankind, Statement to U.S. House of Representatives, October 18, 2007*, 3 INTERCULTURAL HUM. RTS. L. REV. 343 (2008).

⁹⁶ A weakening of the legality principle is however seen in Central and Latin American countries. See M. Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L. J. 1, 28 (2004).

⁹⁷ J.R. Spencer, *Introduction* to EUROPEAN CRIMINAL PROCEDURES 1, 28 (Mireille Delmas-Marty & J.R. Spencer eds., Cambridge Univ. Press 2002).

is about establishing facts, and not about interactions.”⁹⁸

Francoise Tulkens believes that in sentencing “nothing works clearly,” so a mediated settlement would work much better than an imposed settlement. The reality of a criminal justice system with “shrinking supplies” and “increased demand” results in a system of selective law, where not all cases are actually tried. Consequently, law becomes arbitrary, incomplete, and partial.⁹⁹

Practically, one cannot claim that the continental system of justice is bargain-free. For example, there are several institutions¹⁰⁰ within the continental system which include bargaining within their criminal procedure. For example, the system of uncontested cases could be seen as forms of “bargaining,” even though in the logic of the law in Germany, France, or Belgium, “there is no such a thing as pleading guilty.”¹⁰¹

Consider, for example, the German *Strafbefehlsverfahren*, according to which the prosecutor suggests a penalty both to the judge and to the defendant, which can be final unless rejected by the defendant.¹⁰² Additionally, in German criminal procedure, *informelle Absprachen* resembles the informal setting of U.S. plea-bargaining and happens commonly between parties and the court. If the defendant admits certain facts, the judge might offer a sentence reduction and no longer needs to establish the lawfulness of evidence related to the particular admitted facts. This is a regulated procedure that ensures that the principle of equality before the law and the presumption of innocence are not compromised, and that the defendant’s rights are respected.¹⁰³ Even before *Absprachen*, mitigated sentencing upon confession of guilt was common. The judge urged counsel to lead the defendant to believe that a reduced sentence could only come through a confession of guilt. However, many times, there was no sentence benefit actually offered to the defendant for pleading guilty, and the German Supreme Court upheld such decisions anyway.¹⁰⁴

⁹⁸ Françoise Tulkens, *Negotiated Justice*, in EUROPEAN CRIMINAL PROCEDURES 641, 643 (Mireille Delmas-Marty & J.R. Spencer eds., Cambridge Univ. Press 2004) (2002).

⁹⁹ *Id.* at 648.

¹⁰⁰ See generally Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, 11.3 ELEC. J. OF COMP. L. (Dec. 2007), available at <http://www.ejcl.org/113/article113-34.pdf> (comparing procedures substituting for full-fledged trial in civil law countries such as in Europe and Latin America).

¹⁰¹ Spencer, *supra* note 97, at 27. In Belgium, even if the defendant admits the act, the judge or jury still has to hear the evidence. See also Valerie Dervieux, *The French System*, in EUROPEAN CRIMINAL PROCEDURES 218, 237 (Mireille Delmas-Marty & J.R. Spencer eds., 2004) (2002).

¹⁰² Spencer, *supra* note 97, at 4.

¹⁰³ Tulkens, *supra* note 98, at 663-64.

¹⁰⁴ See Thaman, *supra* note 94, at n.12.

Consider further the Italian *patteggiamento*, which represents an agreement between the parties concerning the sentence. The agreement can be initiated jointly or by one of the parties and then agreed to by the other. This negotiation can happen at any phase of the proceedings, until the opening of the trial. While the judge has the sole discretion to accept or refuse the deal based on such grounds as legal mischaracterization of facts, inappropriate penalty, etc., he will be bound by the bargained penalty if he decides to accept the parties' request.¹⁰⁵ This procedure is not without controversy in Italy. Some have reservations as to the good it brings in expediting justice, as contrasted to the harm it causes to the basic principles of criminal procedure. Others even see it as a pragmatic approach for lawyers who want "to get rid of less lucrative cases."¹⁰⁶

In France, there are certain procedures that include the idea of consensual justice. For instance, the *comparution immédiate* [immediate appearance],¹⁰⁷ allows a defendant who is caught in the act to agree to be tried within the same day, if the charges are clear and the case is ready for judgment. To qualify, the crime must be one punishable by one to seven years imprisonment. Another procedure, called the *composition pénale* [compounding of offense],¹⁰⁸ involves an element of negotiation when the accused admits the offense. This procedure applies to minor crimes that still involve violence and damage, mostly caused to a government department.

In Switzerland, the Supreme Court considers confession of guilt as a mitigating factor, and gives out "discounts" of up to 30% in sentence reduction, depending on the stage of proceedings the confession was made.¹⁰⁹ Sentence leniency with fixed tariffs and no bargaining, are present

¹⁰⁵ Antoinette Perrodet, *The Italian System*, in EUROPEAN CRIMINAL PROCEDURES 348, 372 (Mireille Delmas-Marty & J.R. Spencer eds., 2004) (2002). Accord Denis Salas, *The Role of the Judge*, in EUROPEAN CRIMINAL PROCEDURES 488, 511 (Mireille Delmas-Marty & J.R. Spencer eds., 2004) (2002). As an institution of the Italian criminal procedure, the *patteggiamento* or otherwise *applicazione della pena su richiesta delle parti* [imposition of sentencing based on the request of the parties] is enshrined in Article 444 of CPP (*Codice di Procedura Penale*). The sentence is basically lowered up to a third, and not beyond two years. Paragraph 1 states that "[l]'imputato e il pubblico ministero possono chiedere al giudice l'applicazione, nella specie e nella misura indicata, di una sanzione sostitutiva o di una pena pecuniaria, diminuita fino a un terzo, ovvero di una pena detentiva quando questa tenuto conto delle circostanze e diminuita fino a un terzo, non supera due anni di reclusione o di arresto, soli o congiunti a pena pecuniaria." This basically states that it is not considered for crimes carrying harsh penalties.

¹⁰⁶ P. Ferrua, *La Giustizia Negoziata nella Crisi della Funzione Cognitiva del Processo Penale*, in 3 STUDI SUL PROCESSO PENALE 157 (1997). See Tulkens, *supra* note 98, at 670. See also M.G. AIMONETTO, LA "DURATA RAGIONEVOLE" DEL PROCESSO PENALE 209 (1997).

¹⁰⁷ Dervieux, *supra* note 101.

¹⁰⁸ *Id.* at 286.

¹⁰⁹ Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals: With a Focus on the Plea-Bargaining of the ICTY and the Legal Framework of The ICC*, 8

in almost all legal systems of European countries. For this reason, there appears to be a certain degree of approval regarding this issue. Charge bargaining in continental Europe is considered a greater legal sin, which compromises the very *raison d'être* of criminal trial to establish *the material truth*, and thus it is viewed as “bruising continental legal sensibilities.”¹¹⁰ While it could be safe to say that forms of plea bargaining are gaining ground, abundant criticism seems to be its consistent companion.¹¹¹

III. NEGOTIATED JUSTICE IN THE HYBRID PROCEDURES OF INTERNATIONAL CRIMINAL COURTS

When it comes to international criminal courts, the concerns raised in the domestic legal systems become even more conspicuous. The primary impediment to pursuing justice in the *ad hoc* tribunals is the exit-strategy that looms over them from their inception.¹¹² Under such circumstances, the selective process of cases to be dealt with by the court becomes a disconcerting issue. Moreover, whatever the result, there will always be dissatisfaction on the part of the victims and the community at large, who are looking for ultimate justice. The financing of such courts from the international community, through the United Nations, does not run smoothly.¹¹³ The financial constraints, and the resulting impossibility of pursuing full-fledged trials with all due process guarantees, will result in a search for alternative ways of solving cases.¹¹⁴

The situation in the newly created permanent court, the ICC, does not

CHI.-KENT J. INT'L & COMP. L. 1, 6 n.11 (2008).

¹¹⁰ Mirjan Damaska, *Negotiated Justice in International Criminal Courts*, 2 J. INT'L CRIM. JUST. 1018, 1024 (2004), quoted in Petrig, *supra* note 109, at 6 n.12.

¹¹¹ Thaman, *supra* note 94 (providing detailed comparative study of plea bargaining, forms, and institutions resembling it in several countries in Europe and the Americas, as well as criticism surrounding plea bargaining).

¹¹² S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993). This resolution does not specify a closing date but indicates that such a date is to be determined. *See also* President of the Security Council, *Report of the President of the Security Council on the Situation in Burundi, delivered to the Security Council*, U.N. Doc. S/PRST/2002/21 (July 23, 2002) (endorsing ICTY's completion strategy); S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

¹¹³ Press Release, General Assembly, Address of Judge Theodor Meron, President of the ICTY, to the UN General Assembly, U.N. Doc. JP/P.I.S/912-e (Nov. 15, 2004), available at <http://www.icty.org/sid/8339> (noting that in 2004 “financial difficulties are beginning to threaten our capacity to run on all cylinders,” and further noting that member states not meeting their financial obligations was creating “devastating effect on the Tribunal.” For information on financial support and donation to the ICTY, see the official homepage of the Court, available at <http://www.icty.org/sections/AbouttheICTY/SupportandDonations>).

¹¹⁴ *See* NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* 57-90 (Stanford Univ. Press 2007).

look hopeful either. It was recently reported that the ICC would not be able to try more than six cases for any given mass atrocity referred to or undertaken by the Court, due to financial constraints.¹¹⁵ The state parties to the Rome Statute, which made possible the existence of the Court, are limited in what they can offer to its budget.¹¹⁶ The financial situation is further worsened by the fact that the United States, which normally bears the lion's share in the financing of international endeavors related to peacekeeping and humanitarian efforts, is not a party to the Rome Statute, and thus does not contribute to its budget. Even when it does not necessarily disapprove of actions to be taken by the Court, such as the case under discussion in this article, the United States makes sure that no costs will be borne by the UN budget, in which the United States contributes generously.¹¹⁷ Given these difficulties, would it not be prudent for the ICC to turn to alternative ways, such as plea-bargaining, in solving cases like al Bashir's?

In international criminal procedure, many in the scholarly community have rejected the institution of plea-bargaining. Practice, however, speaks a different language. "Bargained" justice is no longer alien to the international arena of criminal justice, albeit with large concerns about its legitimacy voiced by one camp and praise of its effectiveness articulated by the other. Bargained justice is here, and it seems it is here to stay, no matter how paradoxical it might look in the face of the *raison d'être* of international penal law and procedure.

International criminal courts face far greater obstacles than domestic courts. The prosecution has to investigate mass crimes involving numerous victims and potential witnesses, crimes that span a number of years, sometimes long before the court was established, and crimes that occurred in places far away from the Courts' locations, and for reasons based on historical facts and cultural differences that are unfamiliar to most of the Courts' actors. Pressure increases with the notoriety of the players. Concerns also increase for equal access to justice, as well as ending impunity. All parties involved are parading under greater international attention and publicity in front of audiences of millions. Preparing such cases requires ardent commitment and heavy financing. Moreover, the cases involve an especially lengthy process. Under such circumstances, achieving

¹¹⁵ *Id.* at 2.

¹¹⁶ See generally George P. Fletcher & Jens David Ohlin, *The ICC — Two Courts in One?*, 4 J. INT'L CRIM. JUST. 428-33(2006).

¹¹⁷ See S.C. Res. 1593, ¶7, U.N. Doc. S/RES/1593 (Mar. 31, 2005) ("Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.").

justice in order to restore peace and social reconciliation to torn societies becomes less important to the worn-out community that is looking for swift justice, as human nature commands.

All of the above factors have, by default, steered parties and the Courts towards plea-bargaining. This shift is evident in the most recent practice before both the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Their accomplishments and failures in applying plea-bargaining are worth discussing.

A. The International Criminal Tribunal for the former Yugoslavia

On the homepage of the International Criminal Tribunal for the Former Yugoslavia (ICTY), are quick facts regarding 161 indictments, 117 of which have concluded and 44 of which are ongoing.¹¹⁸ The website also contains information regarding acquittals, transfers, and deaths of the accused. However, what are missing are figures regarding plea-bargaining. As detailed below, the ICTY, soon after its creation, had to handle plea agreements and make such agreements a part of its jurisprudence. The increased number of arrests, the quest for rendering justice to a larger amount of the indicted, and the looming completion strategy, created incentives to turn to the then dormant Rule 62, and its subsequent amendments.

In 1999, five years after the ICTY was established, Rule 62 of the Rules of Procedure and Evidence (RPE)¹¹⁹ of the ICTY, was amended to provide the instructions noted below. Since 1994, as a matter of law, the accused had the option of entering a plea of guilt, but there were no details formulated. There was also no mention of any potential agreement between the prosecutor and the accused.

Rule 62 reads, in part, "(vi) in case of a plea of guilty: (a) if before the Trial Chamber, act in accordance with Rule 62 *bis*, or (b) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with

¹¹⁸ ICTY, KEY FIGURES OF ICTY CASES (2009), <http://www.icty.org/sections/TheCases/KeyFigures> (last visited May 1, 2009).

¹¹⁹ INT'L CRIM. TRIB. YUGO. R. P. & EVID. 62, U.N. Doc. IT/32/Rev.7 (Nov. 17, 1999), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>. The essence of the amended Rule mirrors the general scope of Rule 11 of the Federal Rules of Criminal Procedure in the United States. Paragraph (iii) provides that once the indictment has been read, the Trial Chamber has to "inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that, should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count." See Hudson, *supra* note 28.

Rule 62 *bis*.”¹²⁰ Adopted in November 1997 and amended in July 1998, December 1998, and November 1999,¹²¹ Rule 62 *bis* dealing with *Guilty Pleas* was added to provide some of the assurances that the U.S. system provides in Rule 11 of the Federal Rules of Criminal Procedure, particularly that the plea is made voluntarily and knowingly.¹²² Per Rule 62 *bis*:

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;
- (iii) the guilty plea is not equivocal; and
- (iv) there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,

the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.¹²³

Rule 62 *bis* provides that the Court must address the defendant openly in order to make sure the guilty plea is made of the free will of the defendant and not under threats or force.¹²⁴ It must also ensure the defendant has made an informed decision, *i.e.* is aware of the consequences of his plea of guilt and the waivers it connotes.

Before the enactment of Rule 62, ICTY’s practice with guilty pleas had initially taken a bumpy road. The first case dealing with pleas was

¹²⁰ INT’L CRIM. TRIB. YUGO. R. P. & EVID. 62, U.N. Doc. IT/32/Rev.7 (Nov. 17, 1999), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>.

¹²¹ Mentioning dates of amendments to the very sketchy 1994 Rule 62 bears importance as we consider a shift in ICTY’s paradigm of pleas. From 1997 to 1999, the American jurist Gabrielle Kirk McDonald was the International Tribunal’s second President and sat as the presiding judge in the first international war crimes trial in modern times. One cannot but attribute such changes to the president of the Court. For the same claim see Michael P. Scharf, *Trading Justice for Efficiency, Plea-Bargaining and International Tribunals*, 2 J. INT’L CRIM. JUST. 1070, 1073-74 (2004).

¹²² FED. R. CRIM. P. 11; Hudson, *supra* note 28.

¹²³ INT’L CRIM. TRIB. YUGO. R. P. AND EVID. 62 *bis*, U.N. Doc. IT/32/Rev.7 (Nov. 12, 1997) (as amended Nov. 17, 1999), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>.

¹²⁴ See Julian A. Cook, *Plea Bargaining at the Hague*, 30 YALE J. INT’L L. 473, 502 (2005) for a criticism of the ICTY’s formality in satisfying itself regarding the voluntariness of pleas in light of the defendant’s “monosyllabic responses.”

Prosecutor v. Erdemović.¹²⁵ Professor Schabas notes that the judges were somewhat caught by surprise,¹²⁶ and neither the Trial Chamber nor the Appeals' knew how to proceed with the defendants' guilty pleas.¹²⁷ They indeed pleaded guilty, but there was no real bargaining at their first trial. In *Erdemović*, the presiding judge, Jorda, who is French and unaccustomed to the institute of plea-bargaining, saw it merely as a "defense strategy" on the part of the defendant, but noted that the substantive and formal criteria had been met.¹²⁸ The Trial Chamber ended up giving a sentence of ten years, which shocked the defendant, who had expected a lesser term.

The outcome of the *Erdemović*¹²⁹ case changed when the Appeals Chamber remitted the case to a new Trial Chamber holding, *inter alia*, that the accused's plea of guilty was not properly informed, since his lawyer had displayed an ignorance of the law.¹³⁰ The Appeals Chamber also directed that the accused be allowed to re-plead with full knowledge of the nature of the charges against him and the consequences of his plea, laying down certain criteria regarding guilty pleas.¹³¹ Before the new Trial Chamber, the accused pleaded guilty to the charge of a violation of the laws or customs of war, and the Prosecutor withdrew the alternative count of a crime against humanity.¹³² Admission of guilt was only considered as a mitigating circumstance. In its opinion, the Trial Chamber stated:

¹²⁵ *Prosecutor v. Erdemović*, Case No. IT-96-22-TC, Judgment (Nov. 29, 1996).

¹²⁶ WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 424 (Cambridge Univ. Press 2006).

¹²⁷ *Id.*

¹²⁸ *Prosecutor v. Erdemović*, Case No. IT-96-22-TC, Judgment, ¶13 (Nov. 29, 1996).

¹²⁹ *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Judgment (TC) (Mar. 5, 1998). The accused was indicted on May 22, 1996 on one count of a crime against humanity and on an alternative count of a violation of the laws or customs of war. At his initial appearance before Trial Chamber I on May 31, 1996, the accused pleaded guilty to the count of a crime against humanity. The Trial Chamber accepted the accused's guilty plea and dismissed the alternative count of a violation of the laws or customs of war. The Trial Chamber sentenced him on November 29, 1996 to ten years' imprisonment. The defendant appealed the case. *Id.* ¶¶ 4-6.

¹³⁰ *Prosecutor v. Erdemović*, Case No. IT-96-22-AC, Judgment (Oct. 7, 1997).

¹³¹ *Id.* ¶ 7. The criteria were established in a Joint Opinion of Judge McDonald and Judge Vohrah who stated that, ". . . certain pre-conditions must be satisfied before a plea of guilty can be entered. In our view, the minimum pre-conditions are as follows: (a) The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises. (b) The guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty. (c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility." *Id.* ¶ 10.

¹³² *Id.* ¶ 8.

An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.¹³³

The Trial Chamber in this case had to deal with what had not been provided in the RPE, a plea bargain agreement according to which:

(d) The parties, in full appreciation of the sole competence of the Trial Chamber to determine the sentence, recommended that seven years' imprisonment would be an appropriate sentence in this case, considering the mitigating circumstances.

(e) In view of the accused's agreement to enter a plea of guilty to count 2, the Prosecutor agreed not to proceed with the alternative count of a crime against humanity.¹³⁴

The Trial Chamber noted, "[t]he plea agreement in this case is simply an agreement between the parties, reached on their own initiative without the contribution or encouragement of the Trial Chamber."¹³⁵ However, the Trial Chamber returned a sentence of five years imprisonment, adding, "Whilst in no way bound by this agreement, the Trial Chamber has taken it into careful consideration in determining the sentence to be imposed upon the accused."¹³⁶ Rule 62 *bis*, informed by this case, and adopted before the case concluded, created grounds for the written plea agreement, the bargaining of sentence to a maximum of seven years, and bargaining of charges by striking out the count of crimes against humanity. The plea bargain seemed to work as it was supposed to, confirming that the judges could and had exercised their discretion regarding the conviction.

In the case of *Prosecutor v. Jelisić*,¹³⁷ the accused pleaded guilty to thirty-one counts comprising violations of the laws or customs of war and crimes against humanity and pleaded not guilty to the genocide count.¹³⁸ The Trial Chamber sentenced the defendant to 40 years imprisonment on the

¹³³ *Id.* ¶ 16 (ii).

¹³⁴ *Id.* ¶ 18.

¹³⁵ *Id.* ¶ 19.

¹³⁶ *Id.*

¹³⁷ *Prosecutor v. Jelisić*, Case No. IT-95-10-A ("Brčko"), Judgment (AC) (July 5, 2001).

¹³⁸ As per the "Agreed Factual Basis for Guilty Pleas to be Entered by Goran Jelisić" signed by the parties on September 9, 1998. On October 29, 1998, Goran Jelisić confirmed that he was pleading not guilty to genocide but guilty to war crimes and crimes against humanity as described in the Agreed Factual Basis. See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment (TC), ¶¶ 11-12 (Dec. 14, 1999).

counts to which he pleaded guilty and acquitted him on the count of genocide.¹³⁹ The prosecution filed an appeal against the acquittal on the count of genocide, and the defendant cross-appealed the case.¹⁴⁰ The cross-appellant (defendant) argued that the Trial Chamber had “failed to give him any credit for his guilty plea, to which he is entitled under the jurisprudence of both Tribunals.”¹⁴¹ Regarding this argument, the Appeals Chamber responded that the defendant’s grounds for appeal on this ground failed, because the cross-appellant had not met the burden of demonstrating an error on the part of the Trial Chamber. The Appeals Chamber reasoned, “The Statute and Rules leave it open to the Trial Chamber to consider the mitigating effect of a guilty plea on the basis that the mitigating weight to be attached to the plea lies in the discretion of the Trial Chamber.”¹⁴² The sentence was ultimately confirmed at 40 years.

According to the plea agreement in *Prosecutor v. Todorović*,¹⁴³ the prosecution withdrew counts 2 to 27, and the defense withdrew the motions pending before the Trial Chamber, under the condition that the defendant comply with the agreement fully. Particularly, the defendant promised to fully cooperate with the Prosecution in relation to information and evidence known to him regarding the events surrounding the armed conflict in the former Yugoslavia.¹⁴⁴ The agreement also recommended a sentence of 5 to 12 years.¹⁴⁵ The Prosecution argued before the Trial Chamber that “in this case Stevan Todorović, in return for his cooperation and information, has already benefited from the Prosecution’s agreement to recommend a maximum sentence of 12 years, a term of imprisonment significantly lower, it is submitted, than he would have received had he been convicted after trial.”¹⁴⁶ The defense argued that the Trial Chamber should duly consider the fact that “the victims of Todorović’s crimes were spared the emotional

¹³⁹ *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment (TC), ¶¶ 138-39 (Dec. 14, 1999).

¹⁴⁰ *Prosecutor v. Jelisić*, Case No. IT-95-10-A (“Brčko”), Judgment (AC), ¶ 6 (July 5, 2001).

¹⁴¹ *Erdemović*, Case No. IT-96-22-AC, ¶ 119.

¹⁴² *Id.* ¶ 121.

¹⁴³ *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, Judgment (TC) (July 31, 2001) (“The terms of the agreement between the accused and the Prosecution are set out in the confidential *ex parte* ‘Joint Motion for consideration of plea agreement between Stevan Todorović and the Office of the Prosecutor’ filed on November 29, 2000, as amended by a joint corrigendum filed on January 26, 2001 (‘the Plea Agreement’). The detailed factual basis of the allegations and the accused’s participation in those events is set out in a further confidential document entitled ‘Factual basis for the charges to which Stevan Todorović has pleaded guilty,’ filed jointly on January 5, 2001 (‘Factual Basis’) pursuant to Judge Robinson’s instruction.”). *Id.* ¶ 7.

¹⁴⁴ *Id.* ¶ 10.

¹⁴⁵ *Id.* ¶¶ 7-10.

¹⁴⁶ *Id.* ¶ 68.

burden of having to testify at trial.”¹⁴⁷ The court imposed a sentence of 10 years imprisonment.¹⁴⁸

It was in December 13, 2001, almost seven years after ICTY’s creation, and only some months after the court’s practice with the above-mentioned cases, that Rule 62 *ter*, dealing with a Plea Agreement Procedure, was adopted, further formalizing this important practice. Cases displayed a lack of uniformity in treatment of guilty pleas, conspicuous deficiencies in the compilation of plea agreements and factual bases for pleas of guilt, a lack of understanding on the part of the defendants of the elements of the crimes they pleaded guilty to, and questions about what it would entail for the prosecutor to prove such crimes beyond reasonable doubt. Clarification had become necessary; Rule 62 *ter* provides:

(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.¹⁴⁹

Based on Rule 62 *bis* (iv) and Rule 62 *ter* (B), before entering judgment on such a plea, the Court must sufficiently establish the factual basis of guilt.¹⁵⁰ Consequently, the Court may acquit the defendant, even after a confession of guilt, if it finds a fact that would exclude any guilt of the defendant, either

¹⁴⁷ *Id.* ¶ 70.

¹⁴⁸ *Id.* ¶ 115.

¹⁴⁹ INT’L CRIM. TRIB. YUGO. R. P. & EVID. 62 *ter*, U.N. Doc. IT/32/Rev.7 (Dec. 13, 2001), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>.

¹⁵⁰ INT’L CRIM. TRIB. YUGO. R. P. & EVID. 62 *ter* & 62 *bis*, U.N. Doc. IT/32/Rev.7 (1997), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>.

substantively or procedurally. Admission of guilt does not necessarily require a conviction.¹⁵¹

These new Rules and procedures set the stage for pleas to begin working properly. However, in the first ten years, after spending more than \$800 million, the Court concluded nineteen cases, only four of which resulted in guilty pleas. According to Combs, an average trial would last about 17 months, entail the testimony of about 100 witnesses and produce a record of approximately 10,000 pages.¹⁵² Such numbers were not necessarily indicators of success for a court whose time was limited. Therefore, the number of pleas increased. By 2007, the number of pleas had increased to twenty.¹⁵³

Plea agreements that followed the amendment of the rule included intensive bargaining on charges as well as sentencing. Most importantly, the text of the plea agreements far surpassed the rudimentary form it had taken in previous cases. For example, in *Prosecutor v. Ivica Rajić*,¹⁵⁴ the plea agreement enumerated in detail all the fair trial procedural rights that the accused had forfeited by pleading guilty.¹⁵⁵ The plea further explained the nature of the counts to which he pleaded guilty, their basis in law, and the maximum penalty attached to the crime. Addressing flaws observed in cases like *Plavšić*,¹⁵⁶ the *Rajić* plea agreement laid out in detail each element of each of the charged crimes that the Prosecutor would have had to prove beyond any reasonable doubt.¹⁵⁷ The factual basis for the guilty plea was addressed in detail in a separate document of 43 paragraphs, guaranteeing

¹⁵¹ See also GEERT-JAN A. KNOOPS, *THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS* 263 (Kluwer 2005).

¹⁵² COMBS, *supra* note 114, at 28-29.

¹⁵³ Thaman, *supra* note 94.

¹⁵⁴ *Prosecutor v. Ivica Rajić*, Case No. IT-95-12, Judgment (TC) (May 8, 2006). The plea agreement constituted a plea of guilty on the part of the accused on 4 counts, willful killing, inhuman treatment, appropriation of property, and extensive destruction not justified by military necessity and carried out unlawfully and wantonly. The accused further agreed to full cooperation with the Prosecutor. On his end, the prosecutor upon acceptance of the guilty plea and sentence by the Trial Chamber, would move to dismiss without prejudice all the remaining charges. The parties also agreed to a sentence range of a minimum of twelve years and a maximum of fifteen years, though the maximum lawful sentence available at the Trial Chamber for counts pleaded guilty to, was a term of imprisonment up to and including the remainder of the accused's life. See *Prosecutor v. Rajić*, Case No. IT-95-12-PT, Plea Agreement (Oct. 25, 2005). The Trial Chamber returned a verdict of twelve years imprisonment.

¹⁵⁵ See *Prosecutor v. Rajić*, Case No. IT-95-12-PT, Plea Agreement (Oct. 25, 2005).

¹⁵⁶ See Cook, *supra* note 124, at 482-84 for a very good account and review of such flaws.

¹⁵⁷ See *Prosecutor v. Rajić*, Case No. IT-95-12-PT, Plea Agreement, ¶¶ 7-10 (Oct. 25, 2005).

that the accused agreed fully to the facts stated.¹⁵⁸

An important part of the agreement described above was the section in which the accused agreed to fully and substantially cooperate with the Prosecutor, without reservation or evasion, whether in statements of facts or provision of material evidence.¹⁵⁹ Before noting that there are no other promises, agreements, or understandings made, expressed or implied, other than what was included in the agreement at hand, the document reminded the accused that the agreement does not offer him protection from prosecution if he commits perjury, obstruction of justice, or contempt.¹⁶⁰ The plea agreement and the document describing the factual basis for guilt were translated into Croatian, the native language of the accused, and reviewed with the accused and his counsel.¹⁶¹

During this period, the Trial Chamber gained experience in dealing with guilty pleas. In cases when the Trial Chamber was not satisfied with the clarity and completeness of the agreements, it requested the parties to revise them properly.¹⁶²

Through plea bargains, and the cooperation of the defendants garnered through those agreements, the prosecution was able to paint more detailed pictures of the conflict. It gained a large amount of previously unknown information, and was able to establish more accurate records.¹⁶³ Additionally, the prosecution was empowered to pursue and convict other war criminals.

In establishing the ICTY, the United Nations General Assembly tasked

¹⁵⁸ See *Rajić*, Case No. IT-95-12-PT, Factual Basis.

¹⁵⁹ See *Rajić*, Case No. IT-95-12-PT, Plea Agreement, ¶ 17.

¹⁶⁰ *Id.*

¹⁶¹ Even preceding cases like *Česić* treated in detail the issues in the Plea Agreements and the Factual Basis, each being a separate document. See *Prosecutor v. Ranko Česić*, IT-95-10/1-S, Sentencing Judgment (TC) (Mar. 11, 2004) for details of the case. Ranko Česić pleaded guilty on 12 counts through a plea agreement of October 8, 2003. His initial indictment of 27 counts was amended twice. He was convicted of 18 years imprisonment, the higher end of the sentencing range recommended in the plea bargain. However, the pleas of 2005 and onwards seem to be much more developed in each of its elements. So are the factual basis for the guilty pleas. Cf. *Rajić*, Case No. IT-95-12-PT, Plea Agreement. See also *Prosecutor v. Bralo*, Case No. IT-95-17, Plea Agreement & Factual Basis (July 19, 2005).

¹⁶² *Prosecutor v. Zelenović*, Case No. IT-96-23/2, Joint Submission of Annex to Plea Agreement (Jan. 17, 2007). On December 14, 2006, pursuant to Rule 62 *ter* of the Rules of Procedure and Evidence, the Prosecution and the Defence jointly filed a Plea Agreement with the Trial Chamber. In a motion hearing on 16 January 2007, the Trial Chamber requested the parties to file an Annex to the Plea Agreement consisting of a redacted and revised copy of the indictment, reflecting the charges and underlying incidents the Accused intends to plead guilty to.

¹⁶³ Support for this argument can also be found in Carla del Ponte, *Prosecutor, ICTY, Address: Four Years in the Hague: A Retrospective and the Way Forward* (Oct. 2, 2003), available at http://www.ngiz.nl/events/archive/files/20031002_ngiz_delponte.pdf.

the *ad hoc* tribunal not only with the duty to end impunity and establish individual accountability for the atrocities in the territory of the Former Yugoslavia, but also to pave the way for reconciliation in the torn communities and to establish historical records of the conflicts.¹⁶⁴ Judge Antonio Cassese noted in 1995:

Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand.¹⁶⁵

However, does negotiated justice have the necessary ingredients to bring peace, reconciliation, and accurate historical records?

From a legal point of view, facts established by a court beyond reasonable doubt are not reviewable. However, the ICTY has also recorded historical facts through admissions of guilt, while sparing the victims from testifying. Pursuant to a plea agreement, in *Prosecutor v. Dragan Obrenović*,¹⁶⁶ the defendant narrated events that occurred from 1995 to 1998, particularly regarding the massacre of Srebrenica and the mass graves. During the sentencing hearing, he stated:

In Bosnia, a neighbor means more than a relative. In Bosnia, having coffee with your neighbor is a ritual, and this is what we trampled on and forgot. We lost ourselves in hatred and brutality. And in this vortex of terrible misfortune and horror, the horror of Srebrenica happened. . . . I will be happy if my testimony helps the families of the victims, if I can spare them having to testify again and relive the horrors and the pain during their testimony. It is my wish that my testimony should help prevent this ever happening again, not just in Bosnia, but anywhere in the world.¹⁶⁷

It is of interest to discuss the plea bargain in the case of Biljana

¹⁶⁴ Different objectives of the Tribunal were laid out in the ICTY, Annual Report of the ICTY, U.N. Doc. A/49/342-S/1994/1007, ¶¶ 11-18 (Aug. 29, 1994). See ICTY Home Page, <http://www.icty.org/sections/AbouttheICTY> ("The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history.") (last visited May 1, 2009).

¹⁶⁵ Press Release, ICTY, The Tribunal Welcomes the Parties' Commitment to Justice and Joint Statement by the President and the Prosecutor, U.N. Doc. CC/PIO/027-E (Nov. 24, 1995), available at <http://www.un.org/icty/pressreal/p027-e.htm>. The joint statement was issued upon the conclusion of the Dayton peace agreement.

¹⁶⁶ *Prosecutor v. Obrenović*, Case No. IT-02-60-T, Plea Bargaining & Statement of Facts (May 20, 2003).

¹⁶⁷ See ICTY at a Glance, <http://www.un.org/icty/glance-e/index.htm>.

Plavšić,¹⁶⁸ a Serbian Representative to the Presidency of the Socialist Republic of Bosnia and Herzegovina, acting co-President for some time during the conflict, and a member of the collective and expanded Presidencies of *Republika Srpska*. She played a prominent role in advancing the idea of a “greater” Serbia, wanting to purge the non-Serbian population from Bosnia Herzegovina.¹⁶⁹ She surrendered voluntarily to the ICTY on January 10, 2001. At her initial appearance before Trial Chamber III on January 11, 2001, the accused pleaded not guilty to all counts,¹⁷⁰ only to change later to a guilty plea in a plea agreement of 2002.¹⁷¹ She pleaded guilty to count 3, persecutions, a crime against humanity, and the Prosecutor moved to dismiss all other charges.¹⁷² The Trial Chamber dismissed Counts 1 and 2, which accused her of genocide.¹⁷³ In its judgment, the Trial Chamber, referring to its prior jurisprudence and assessing the aggravating circumstances, noted that “the consequences are necessarily more serious if individuals who occupy top military or political positions use those positions to commit crimes.”¹⁷⁴ The Tribunal, however, distinguished that the accused was not in the very first rank of the leadership, nor was she the mastermind behind the atrocities, and that she played a lesser role in its execution than others.¹⁷⁵

The Trial Chamber acknowledged substantial mitigating factors, based on the Prosecution’s Brief.¹⁷⁶ It accepted the unprecedented steps taken by the accused in order to mitigate the crime against humanity for which she was responsible.¹⁷⁷ The Trial Chamber noted that relevant mitigating factors

¹⁶⁸ Prosecutor v. Plavšić, Case No. IT-00-39 & 40-PT, Plea Agreement (Sept. 30, 2002).

¹⁶⁹ For details of the case see Prosecutor v. Plavšić, Case No. IT-00-40-I, Initial Indictment (Apr. 3, 2000), available at <http://www.icty.org/x/cases/plavsic/ind/en/pla-ii000407e.pdf>.

¹⁷⁰ Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, Sentencing Judgment, ¶ 3 (Feb. 27, 2003).

¹⁷¹ Prosecutor v. Plavšić, Case No. IT-00-39 & 40-PT, Plea Agreement (Sept. 30, 2002).

¹⁷² See Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, Sentencing Judgment, ¶ 5 (Feb. 27, 2003) for the Decision Granting Prosecution’s Motion to Dismiss Counts 1, 2, 4, 5, 6, 7 and 8 of the Amended Consolidated Indictment of December 20, 2002.

¹⁷³ See Prosecutor v. Plavšić, Case No. IT-00-40-I, Amended Consolidated Indictment (Dec. 20, 2002), available at <http://www.icty.org/x/cases/plavsic/ind/en/kra-cai020307e.pdf>.

¹⁷⁴ *Plavšić*, Case No. IT-00-39 & 40-PT, Plea Agreement, ¶ 54. In the same paragraph, the Trial Chamber refers to the ICTR in the case of *Kambanda*, stating, “The Prosecution moreover observes that in the *Kambanda* case at the International Criminal Tribunal for Rwanda (“ICTR”) the Chamber emphasized the aggravating impact of Kambanda’s leadership position when assessing the weight of aggravating factors. Jean Kambanda was the Prime Minister of Rwanda at the time of the commission of the crimes in question.” *Id.*

¹⁷⁵ *Plavšić*, Case No. IT-00-39 & 40-PT, Plea Agreement, ¶57.

¹⁷⁶ *Plavšić*, Case No. IT-00-39 & 40/1, Sentencing Judgment, ¶ 61, available at <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>.

¹⁷⁷ *Id.* ¶ 43 (referring to Prosecution Sentencing Brief).

in her case included, “entry of a guilty plea and acceptance of responsibility, remorse, voluntary surrender, post-conflict conduct, previous good character, [and] age.”¹⁷⁸

The element of cooperation with the Prosecution was missing in her plea agreement, but the Tribunal stated, “co-operation with the Prosecutor is a mitigating circumstance, but it does not follow that failure to do so is an aggravating circumstance.”¹⁷⁹

Referencing Professor Elie Wiesel, who used Plavšić as an example of a high official who freely and wholly admitted to a crime, the Tribunal emphasized the significance of the plea of guilty in accepting the truth regarding atrocities committed and challenging those who would falsify history.¹⁸⁰ The Prosecution regarded her admission of truth (accompanied with expression of full and unconditional remorse) as a tool that would allow “people to reconcile with their neighbours.”¹⁸¹ The precondition for reconciliation of broken communities was summarized in Plavšić’s statement when she changed her plea, “To achieve any reconciliation or lasting peace in BH, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility – regardless of their ethnic group. This acknowledgement is an essential first step.”¹⁸²

The Tribunal quoted Plavšić’s statement at the Sentencing Hearing: “I now come to the belief and accept the fact that many thousands of innocent people were the victims of an organised, systematic effort to remove Muslims and Croats from the territory claimed by Serbs.”¹⁸³ She accepted that the leadership of her country had violated the basic duty to restrain itself and to respect the human dignity of others.¹⁸⁴ She further added that “[t]he knowledge that I am responsible for such human suffering and for soiling the character of my people will always be with me.”¹⁸⁵

The Tribunal also referred to Dr. Alex Boraine, former Deputy Chairperson of the Truth and Reconciliation Commission in South Africa and the founding President of the International Center for Transitional Justice. Dr. Boraine had found the guilty plea of a high official to be of utmost importance in four aspects:

Firstly, as the plea of guilty was offered by a Serb nationalist and former political leader, Mrs. Plavšić’s confession sends out

¹⁷⁸ *Id.* ¶ 61.

¹⁷⁹ *Id.* ¶ 64.

¹⁸⁰ *Id.* ¶ 69.

¹⁸¹ *Id.* ¶ 70.

¹⁸² *Id.* ¶ 74.

¹⁸³ *Id.* ¶ 72.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

a crucial message about the true criminal nature of the enterprise in which she was involved; secondly, by surrendering and pleading guilty, Mrs. Plavšić is also sending a powerful message about the legitimacy of the International Tribunal and its functions; thirdly, Mrs. Plavšić's apology for her actions and her call on other leaders to examine their own conduct is of particular importance; and fourthly, the confession of guilt and acceptance of responsibility by Mrs. Plavšić may demonstrate to the victims of the persecutory campaign that someone has acknowledged their personal suffering.¹⁸⁶

Passing a sentence of eleven years on the 72-year-old former President, the Trial Chamber gave formidable weight to the guilty plea, believing it to be an important element in promoting reconciliation in Bosnia and Herzegovina and the region as a whole,¹⁸⁷ stating, though, that "[n]o sentence which the Trial Chamber passes can fully reflect the horror of what occurred or the terrible impact on thousands of victims."¹⁸⁸

Ending with a completely different result was the case of another high official, the former Prime Minister of Kosovo, Ramush Haradinaj.¹⁸⁹ At the time Haradinaj was served with the indictment, he was the Prime Minister of Kosovo within the provisional democratic self-governing institutions under Security Council Resolution 1244 (1999).¹⁹⁰ He immediately stepped down from his position and surrendered himself to the jurisdiction of the Tribunal. At his initial appearance before Trial Chamber I, on March 14, 2005, the accused pleaded not guilty to nineteen charges.¹⁹¹ On June 6, 2005, Trial Chamber II granted Haradinaj provisional release until ordered to return to the custody of the Tribunal. Certain conditions were set governing his provisional release. These included the requirement that Haradinaj notify United Nations Mission in Kosovo twenty-four hours in advance of any time that he planned to leave Prishtinë for Glogjan and vice versa.¹⁹² In addition,

¹⁸⁶ *Id.* ¶¶ 75-76. Dr. Boraine had also stressed the vital nature of full disclosure in confessions, as regards the reconciliatory process. According to him, genuine and voluntary expressions of remorse could also provide a degree of closure for victims. *Id.* ¶ 77.

¹⁸⁷ *Id.* ¶¶ 80-81.

¹⁸⁸ *Id.* ¶ 132.

¹⁸⁹ Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-T, Judgment (TC) (Apr. 3, 2008), available at <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>. The initial indictment against Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj was confirmed on March 4, 2005, and it was amended four times. *Id.* at 280.

¹⁹⁰ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>.

¹⁹¹ *Id.* at 281.

¹⁹² See Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, ¶¶ 5-6 (June 6, 2005), available at

for the first 90 days of his provisional release, Haradinaj was prohibited from making any public appearances.¹⁹³ However, in his capacity of the President of the Alliance for the Future of Kosovo, he was allowed to engage in administrative or organizational activities, under the conditions stated above.¹⁹⁴ By October 12, 2005, Haradinaj was also allowed to engage in public activities, if UNMIK, as well as the Prosecution, approved the request. This lasted until February 1, 2007, when he was called for trial.¹⁹⁵ At trial, the Trial Chamber was not satisfied beyond reasonable doubt of the existence of the criminal enterprise for which Haradinaj was charged, so upon completion of the trial, the Trial Chamber found Haradinaj not guilty on all counts in the indictment, and he was immediately released from the United Nation Detention Unit.¹⁹⁶

By surrendering to the Tribunal's jurisdiction, Haradinaj not only complied with his legal duties, he also contributed to the internal order of Kosovo, where thousands of his supporters and loyalists were ready for a violent confrontation had there been any attempt for forced arrest.

His acquittal ended the saga of the Prime Minister of Kosovo, who stepped down from his position and surrendered voluntarily upon indictment and underwent trial. Justice had prevailed, this time through a not guilty finding of the Tribunal.

As will be seen below, this verdict was not duplicated in the case of another head of state, this one in the war-torn country of Rwanda.

B. The International Criminal Tribunal for Rwanda

In the first nine years after its creation, there were three guilty pleas entered before the International Criminal Tribunal for Rwanda (ICTR). These pleas did not involve any sentence bargaining.¹⁹⁷ The results were sentences of life imprisonment.¹⁹⁸

The element of charge bargaining, however, seemed to have been important in Rwanda's plea-bargained cases.¹⁹⁹ Withdrawal by the

<http://www.icty.org/x/cases/haradinaj/tdec/en/050606.htm>.

¹⁹³ *Id.* ¶ 6.

¹⁹⁴ *Id.* ¶ 5.

¹⁹⁵ Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-T, Judgment (TC), at 283, ¶¶ 10-11 (Apr. 3, 2008).

¹⁹⁶ *Id.* at 277, ¶ 502.

¹⁹⁷ See Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment, ¶ 48 (Sept. 4, 1998), available at <http://69.94.11.53/ENGLISH/cases/Kambanda/judgement/kambanda.html>.

¹⁹⁸ *Id.*

¹⁹⁹ Combs argues that defendants were not willing to plead guilty to the crime of genocide. This was the charge they bargained. See numerous details in Chapter 5 of COMBS, *supra* note 114. She notes that "by and large, ICTR defendants deny that the Rwandan violence constituted a genocide . . ." *Id.* at 97.

prosecution of the charge of genocide was considered a good result of plea negotiations. This outcome was not only beneficial from the aspect of legal consequences but also psychologically, as the defendants considered the conflict merely a bloody civil war, not genocide.²⁰⁰

Of particular interest is the case involving the former Prime Minister of Rwanda, *Prosecutor v. Kambanda*,²⁰¹ who pleaded guilty shortly after the *Erdemović* case before the ICTY.²⁰² The case marked the first time that a head of government was convicted of genocide. He pleaded guilty to six charges against him related to genocide and crimes against humanity, but there was no bargaining regarding his potential sentence.²⁰³ Kambanda expressed no regret, even when given the chance to do so, though he did provide extensive amounts of information to the prosecution.²⁰⁴ He was sentenced to life imprisonment for genocide.²⁰⁵ In its decision, the Appeals Chamber indicated that given Kambanda's position of authority, the aggravating circumstances surrounding the gravity of his crimes left no room for any mitigating circumstances.²⁰⁶ He was given the maximum sentence available to the Court.²⁰⁷

In his plea bargain, Kambanda was promised a safe haven for his family.²⁰⁸ Dissatisfied with the sentencing, however, he tried unsuccessfully, through the Appeals Chamber, for a revision of the sentence.²⁰⁹ He also attempted to have a new trial awarded by quashing the guilty verdict, under allegations of having been compelled to plead guilty because of the conditions under which he was kept and interrogated. He stated concern that his guilty plea was not considered a mitigating factor in deciding the sentence.²¹⁰ The Appeals Chamber confirmed the decision of the Trial Chamber observing that there were no indications that Kambanda was mentally incompetent so as not to understand the consequences of his

²⁰⁰ For a more detailed analysis on this issue see generally COMBS, *supra* note 114, at 92-112. As to the number of guilty pleas until now, one can count at least 9 such cases on the official website of the ICTR. See <http://69.94.11.53/default.htm> (last visited May 1, 2009).

²⁰¹ *Kambanda*, Case No. ICTR 97-23-S, Judgment.

²⁰² *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgment (Mar. 5 1998), available at <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf>.

²⁰³ *Kambanda*, Case No. ICTR 97-23-S, Judgment, ¶ 48.

²⁰⁴ *Id.* ¶¶ 47, 51.

²⁰⁵ *Id.* at pt. IV (Verdict).

²⁰⁶ *Kambanda v. Prosecutor*, Case No. ICTR- 97-23-A, Judgment, ¶¶ 125-26 (Oct. 19, 2000), available at <http://69.94.11.53/ENGLISH/cases/Kambanda/judgement/191000.htm>.

²⁰⁷ According to Article 23 of the ICTR Statute, the penalty imposed by the Tribunal shall be limited to imprisonment. See Statute of the International Tribunal for Rwanda, S.C. Res. 955 (Nov. 8, 1994), available at <http://69.94.11.53/ENGLISH/Resolutions/955e.htm>.

²⁰⁸ *Kambanda*, Case No. ICTR 97-23-S, Judgment, ¶¶ 48-49.

²⁰⁹ *Kambanda*, Case No. ICTR 97-23-A, Judgment, ¶ 1.

²¹⁰ *Kambanda*, Case No. 97-23-S, Judgment, ¶ 60.

guilty plea.²¹¹ It further stated that if he had refused his right to trial “in the hope of receiving a lighter sentence, he cannot claim that the plea was involuntary, merely because he received a life-term after pleading guilty to several counts of genocide and crimes against humanity.”²¹² Kambanda’s allegations did, however, motivate the Court to amend its RPE Rule 62, adding Rule 62 *bis*, which set out the procedure to follow when the defendant entered a guilty plea. The guilty plea not only had to be voluntary, unequivocal and informed, as was already provided in Rule 62 B., but the new amendment stated:

(A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty.²¹³

As it had in ICTY’s RPE before, this rule streamlined the procedure creating a roadmap for bargaining, a roadmap absent when Kambanda was being tried.

The difficulties inherent in Kambanda’s sentencing did not inspire increased usage of plea-bargaining. Moreover his complaints regarding the incompetence of his counsel, coupled with the sentencing result, raised red flags for cases involving top officials. Though this verdict has been seen as justified,²¹⁴ it nevertheless warrants a closer analysis of the application of

²¹¹ *Kambanda*, Case No. 97-23-A, Judgment, ¶ 62.

²¹² *Id.* ¶¶ 62-63.

²¹³ INT’L CRIM. TRIB. RWANDA R. P. & EVID. 62 *bis* (Mar. 14, 2008), available at <http://69.94.11.53/ENGLISH/rules/080314/080314.pdf>.

²¹⁴ See Olivia Swaak-Goldman, *Kambanda v. Prosecutor*. No. ICTR 97-23-A, 95 AM. J.

pleas.

While there are no arguments that the heinous crimes that international criminal tribunals were established to prosecute deserve the sentences sanctioned, the problem is much more complicated when the multiplicity of factors are taken under consideration. Factors such as the social conflicts, the need for reconciliation and sometimes nation-rebuilding, the principle of economy in a country lacking resources, the prospective length of proceedings when trying to achieve a full-fledged trial with all its guarantees, and the default need to select the cases that will be prosecuted, all create a plethora of potentially unwanted outcomes. Under such circumstances, plea bargaining does deserve a fast pass through the gates of justice.

After *Kambanda*, the ICTR resolved a few cases in which the defendants resorted to pleading guilty but also procured sentence benefits as a result of such guilty pleas. For example, Omar Serushago pleaded guilty, was able to have withdrawn one count out of six, and was sentenced to fifteen years in prison.²¹⁵ Georges Ruggiu, pleaded guilty to two out of six charges and ended up with a sentence of 12 years.²¹⁶ Vincent Rutaganira pleaded guilty and was sentenced to six years imprisonment.²¹⁷ His case can be considered to be the first case with active sentence bargaining.²¹⁸ Another interesting case is that of Paul Bisengimana,²¹⁹ who was found guilty of extermination as a crime against humanity and was sentenced to fifteen years imprisonment,²²⁰ though the plea agreement had a range between 12 and 14 years.²²¹ However, this was the first case revealing a refined charge bargaining.²²² The initial indictment charged Bisengimana

INT'L L. 656, 661 (2001).

²¹⁵ Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence (Feb. 5, 1999), available at <http://69.94.11.53/default.htm>; see also Prosecutor v. Serushago, Case No. ICTR 98-39-A, Reasons for Judgment (Apr. 6, 2000), available at <http://69.94.11.53/default.htm>.

²¹⁶ Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment & Sentence (June 1, 2000), available at <http://69.94.11.53/default.htm>.

²¹⁷ Prosecutor v. Rutaganira, Case No. ICTR 95-1C-T, Judgment & Sentence (Mar. 14, 2005), available at <http://69.94.11.53/default.htm>.

²¹⁸ *Id.* ¶¶ 102-04.

²¹⁹ Prosecutor v. Bisengimana, Case No. ICTR 00-60-T, Judgment & Sentence (Apr. 13, 2006), available at <http://69.94.11.53/default.htm>.

²²⁰ "However, despite the fact that the Chamber is not sentencing Paul Bisengimana for the count of murder as a crime against humanity, the Chamber is of the view that considering the official position of the Accused and the number of persons killed- more than a thousand- in his presence at Musha Church and many others with his knowledge at Ruhanga Complex, a higher sentence than the range proposed by the Parties is justified for the single count of extermination." *Bisengimana*, Case No. ICTR 00-60-T, Judgment & Sentence, ¶ 202.

²²¹ *Bisengimana*, Case No. ICTR 00-60-T, Judgment & Sentence, ¶ 184.

²²² COMBS, *supra* note 114, at 92-112.

for individual responsibility on five counts. Six days later the Prosecutor withdrew two counts related to genocide and one regarding rape as a crime against humanity.²²³

Generally speaking, plea bargaining in the ICTR has not been as successful as it has been in the ICTY, where numerous cases have by now been solved through plea bargaining.²²⁴

C. *The International Criminal Court (ICC)*

The ICC came to life when the international community became aware of the “unimaginable atrocities that deeply shock the conscience of humanity,”²²⁵ and reacted to prevent such grave crimes from threatening the “peace, security and well-being of the world.”²²⁶

After long and protracted discussions, the Statute of Rome Establishing an International Criminal Court (Rome Statute)²²⁷ was adopted on July 17, 1998, by a vote of 120 in favor, 21 abstentions and 7 votes against (including the United States, Israel and China).²²⁸ The Final Act of the Conference²²⁹ was to draft the ICC’s Rules of Procedure and Evidence, as well as the Elements of Crimes.²³⁰ The Assembly of States Parties, convened in September 2002, formally approved the 2000 draft of the Preparatory Commission’s Elements of Crimes²³¹ as well as the Rules of Procedure and Evidence.²³² The Rome Statute entered into force on July 1, 2002.²³³ The election of judges was completed by February 2003.²³⁴ The first Chief Prosecutor of the ICC, Luis Moreno Ocampo, was elected in

²²³ *Bisengimana*, Case No. ICTR 00-60-T, Judgment & Sentence, ¶ 184.

²²⁴ Ralph Henham & Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia*, 16 CRIM. L. F. 49 (2005). The authors note that about a third of cases are solved through plea agreements.

²²⁵ Rome Statute of the International Criminal Court pmb. ¶ 2, July 17, 1998, U.N. Doc. A/CONF. 183/9, 2187 U.N.T.S. 90.

²²⁶ *Id.* pmb. ¶ 3.

²²⁷ *Id.*

²²⁸ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 9-10, 18 (Cambridge Univ. Press 2d ed. 2004) (2001) [hereafter SCHABAS, ICC].

²²⁹ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10 (July 17, 1998).

²³⁰ *Id.* at annex I.F.

²³¹ SCHABAS, ICC, *supra* note 228, at 279.

²³² SCHABAS, ICC, *supra* note 228, at 322.

²³³ In fact, the United Nations organized a ceremony of depositing the instruments of ratification for ten states the same day, April 11, 2002, in order for all of them to reach the sixty states mark for entry into force of the Statute simultaneously. SCHABAS, ICC, *supra* note 228, at 20.

²³⁴ SCHABAS, ICC, *supra* note 228, at 20-21.

April 2003.²³⁵ With this, the Court was ready to begin its work.

Structurally, the ICC is an independent international organization, formally separate from the UN, and composed of four organs: the Presidency, the Divisions (Pre-Trial Division, Trial Division, and Appeals Division), the Office of the Prosecutor, and the Registry.²³⁶

The Rome Statute creates a permanent court in order to bring to trial persons accused of the most serious international crimes, such as genocide, crimes against humanity and war crimes, in cases when a national legal system has failed to do so.²³⁷ The Court's subject-matter jurisdiction is limited to these crimes.²³⁸ In reaction to the sometimes liberal construction of crimes in the ICTY, Article 22(2) of the Rome Statute mandates the "definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted."²³⁹

In contrast to the *ad hoc* tribunals, and in order to be palatable to all states, the principle of *nullum crimen sine lege*²⁴⁰ was meticulously followed with respect to the jurisdiction *ratione temporis* of this Court.²⁴¹ The ICC will adjudicate only offenses committed after the entry into force of the Statute, i.e. July 1, 2002.²⁴² As far as jurisdiction *ratione personae* is concerned, i.e. the power of the Court over certain persons alleged to have committed an international crime, the ICC limits itself to offenses committed on the territory of, or by citizens of, States party to its Statute or States which have accepted the jurisdiction of the Court with respect to the

²³⁵ *Id.* at 21.

²³⁶ Rome Statute art. 34.

²³⁷ *Id.* art. 1.

²³⁸ *Id.* art. 5.

²³⁹ This resolves an issue debated particularly between ICTY/ICTR judges with a criminal law background and those with a public international law background in favor of the former. The question remains open, however as to whether the provisions of the Rome Statute other than those defining crimes should be interpreted in the more contextual and purposive way the Vienna Convention on the Law of Treaties (Articles 31 and 32) suggests or in the strict constructionist manner prevalent in the field of criminal law. *Cf.* SCHABAS, ICC, *supra* note 228, at 93-95.

²⁴⁰ Literally translated, the principle means "there is no crime without a law." Article 22(1) of the Rome Statute defines it the following way: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Rome Statute art. 22.

²⁴¹ Jurisdiction *ratione temporis* means the power of the Court to adjudicate cases of alleged crimes committed at a certain time. Under Article 11(1) of the Rome Statute, "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." Rome Statute art. 11.

²⁴² Rome Statute art. 11.

particular crime in question.²⁴³ The only exception arises with respect to a situation referred to the ICC by the Security Council.²⁴⁴

In the original International Law Commission draft, the ICC was designed to have primacy over national courts, just like the *ad hoc* tribunals for Yugoslavia and Rwanda.²⁴⁵ Due to heavy political opposition, this concept was replaced by that of “complementarity.”²⁴⁶ Therefore, the ICC is only allowed to exercise its jurisdiction if the state with competing jurisdictional claims is “unable or unwilling” to prosecute the offender.²⁴⁷

As with the ICTY and ICTR, the procedure of this Court is a decidedly mixed affair. It is a hybrid between common law and civil law criminal procedure, with the starting point being the adversarial system, but not abandoning the search for truth as an important goal to be safeguarded by traditional inquisitorial rights of the bench.²⁴⁸ The details of the process before the ICC are still to be developed in the practice of the Court.

Proceedings before the ICC can be started by the Prosecutor, acting *proprio motu*²⁴⁹ or upon referral of a certain “situation” by the Security Council, in which one or more crimes under the jurisdiction of the Court “appears to have been committed.”²⁵⁰ Any State party may also refer a pertinent “situation” to the Court.²⁵¹ If the Prosecutor decides to investigate *proprio motu*, the Pre-Trial Chamber must first authorize the investigation.²⁵²

In deciding to initiate an investigation, the Prosecutor must consider the following factors:

- (a) [whether] [t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) [t]he case is or would be admissible under Article 17; and,
- (c) [t]aking into account the gravity of the crime and the

²⁴³ *Id.* art. 12.

²⁴⁴ *Id.* art. 13(b).

²⁴⁵ SCHABAS, ICC, *supra* note 228, at 16.

²⁴⁶ SCHABAS, ICC, *supra* note 228, at 13-14.

²⁴⁷ Rome Statute art. 17.

²⁴⁸ For details see SCHABAS, ICC, *supra* note 228, at 143 (“Although much of the procedure of the Court is a hybrid of different judicial systems, it seems clear that there is a definite tilt towards the common law approach of an adversarial trial hearing. However, the exact colouring that the Court may take will ultimately be determined by its judges.”).

²⁴⁹ Rome Statute arts. 13(c), 15(1) (“*proprio motu*” means on his own motion or initiative).

²⁵⁰ *Id.* art. 13(b).

²⁵¹ *Id.* arts. 13(a), 14.

²⁵² *Id.* arts. 15(3)-(4).

interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.²⁵³

Thus, a case may not be prosecuted unless a state which has jurisdiction is “unwilling or unable genuinely to carry out the investigation or prosecution” (the above-mentioned principle of complementarity).²⁵⁴ In addition, the Security Council may request the Prosecutor to defer an investigation or prosecution for a (renewable) period of 12 months.²⁵⁵ Despite these limitations, the Prosecutor still has a great deal of power as to whether to initiate a proceeding in the first place.

If the Prosecutor decides to proceed, the investigation must cover all relevant facts, in particular, “investigate incriminating and exonerating circumstances equally.”²⁵⁶ This duty analogizes the Prosecutor more to the prosecutors or *juges d’instruction* of civil law systems than the adversarial prosecuting attorneys of the common law²⁵⁷ and “[f]ully respect the rights of persons arising under this Statute.”²⁵⁸

Upon investigation and application by the Prosecutor, the Pre-Trial Chamber may issue a warrant of arrest for an individual if it is satisfied “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”²⁵⁹ Upon application by the Prosecutor, it may alternatively issue a summons for the person to appear.²⁶⁰ State parties are under a general obligation to cooperate with the Court in its investigation of crimes.²⁶¹ This includes compliance with a Court request for arrest and surrender of the wanted person to the Court.²⁶²

Upon the wanted person’s surrender or voluntary appearance before the Court, the Prosecutor submits formal charges, and, within a reasonable time after such surrender or voluntary appearance, the Pre-Trial Chamber must hold a hearing to confirm the charges on which the Prosecutor intends to seek trial.²⁶³ On the basis of this hearing, the Pre-Trial Chamber determines whether there is sufficient evidence to establish “substantial” grounds to

²⁵³ *Id.* art 53(1).

²⁵⁴ *Id.* art. 17.

²⁵⁵ *Id.* art. 16.

²⁵⁶ SCHABAS, ICC, *supra* note 228, at 126.

²⁵⁷ *Id.*

²⁵⁸ Rome Statute arts. 54(1)(a) & (c).

²⁵⁹ *Id.* art. 58(1)(a).

²⁶⁰ *Id.* art. 58.

²⁶¹ *Id.* art. 86.

²⁶² *Id.* art. 89.

²⁶³ *Id.* art. 61(1).

believe the person committed each of the crimes charged.²⁶⁴ Based on its determination, the Pre-Trial Chamber shall only confirm charges it has determined to be supported by sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed.²⁶⁵

Article 65 of the Rome Statute provides safeguards in the use of confession evidence.²⁶⁶ Plea bargaining is severely limited. According to the normative framework of the ICC, the prosecution of crimes under its jurisdiction can be accomplished through a full-fledged trial when the not guilty plea has been entered, or by employing a separate procedure if the defendant decides to enter a guilty plea.²⁶⁷ Article 65 of the Rome Statute deals with proceedings on an admission of guilt:

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the

²⁶⁴ *Id.* art. 61(7).

²⁶⁵ *Id.*

²⁶⁶ For further detail, particularly as it concerns plea bargaining and its (non)impact on sentencing by the Court, as well as a comparison with such procedure in ICTY and ICTR, see Ralph Henham, *Procedural Justice and Human Rights in International Sentencing*, 4 INT'L CRIM. L. REV. 185, 192-204 (2004).

²⁶⁷ The procedures for trial are laid down in Part 6 (Article 62 *et seq.*) of the Statute, the proceedings upon an admission of guilt in Article 65. Rome Statute.

crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.²⁶⁸

The practice since the establishment of the Court in 2003 is meager. There are presently four “situations” on the docket of the Prosecutor.²⁶⁹ Three of them were brought by state parties to the Office of the Prosecutor.²⁷⁰ The one discussed here was brought by the Security Council.²⁷¹

The first situation was referred to the ICC by the Government of the Democratic Republic of Congo (DRC) on March 3, 2004.²⁷² On June 23, 2004, the Prosecutor announced his decision to open an investigation on the

²⁶⁸ Rome Statute art. 65.

²⁶⁹ ICC Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited May 1, 2009).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB>.

situation in the DRC.²⁷³

On January 12, 2006, the Prosecutor submitted an application to the Chamber for the issuance of a warrant of arrest against Mr. Thomas Lubanga Dyilo.²⁷⁴ Thomas Lubanga Dyilo, a national of the DRC, is the alleged founder and President of the Union des Patriotes Congolais (UPC) and the Commander-in-Chief of the Forces patriotiques pour la libération du Congo (FPLC).²⁷⁵

The warrant of arrest against Mr. Lubanga was issued under seal on February 10, 2006 and unsealed on March 17, 2006, the same day he was arrested in Kinshasa and transferred to the Court in The Hague.²⁷⁶ According to the arrest warrant:

There are reasonable grounds to believe that from July 2002 to December 2003 members of the FPLC carried out repeated acts of conscription into the FPLC of children under the age of fifteen who were trained in the FPLC training camps of Bule, Centrale, Mandro, Rwampara, Bogoro, Sota and Irumu.²⁷⁷

Additionally:

There are reasonable grounds to believe that, during the relevant period, members of the FPLC repeatedly used children under the age of fifteen to participate actively in hostilities in Libi and Mbau in October 2002, in Largu at the beginning of 2003, in Lipri and Bogoro in February and March 2003, in Bunia in May 2003 and Djugu and Mongwalu in June 2003.²⁷⁸

On January 29, 2007, Pre-Trial Chamber I, according to Article 61(7) of the Statute, confirmed:

on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting

²⁷³ Press Release, ICC, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (June 23, 2004), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>.

²⁷⁴ *Newsletter #10*, ICC NEWSLETTER (ICC, The Hague, Neth.), Nov. 2006, http://www2.icc-cpi.int/NR/rdonlyres/2AD04DD6-6E18-4B9B-9477-4DFCD8D607A4/278462/ICCNL10200611_En.pdf.

²⁷⁵ *Id.*

²⁷⁶ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006), available at <http://www.icc-cpi.int/iccdocs/doc/doc191959.pdf>.

²⁷⁷ *Id.* at 3.

²⁷⁸ *Id.*

children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003.²⁷⁹

The Pre-Trial Chamber I also confirmed, “the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003.”²⁸⁰ It committed Thomas Lubanga Dyilo to a Trial Chamber for trial, the first such trial before the ICC.²⁸¹

The prosecution, however, hit a significant roadblock when, on June 13, 2008, Trial Chamber I stayed the trial of Mr. Lubanga. According to the Chamber, the Prosecutor’s Office had incorrectly blocked the release of exculpatory materials in its possession, to both the defense and the Chamber, by entering into improper confidentiality agreements with information providers, in particular, the UN.²⁸² The Chamber stated that the “disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused’s right to a fair trial.”²⁸³ On July 2, 2008, the Trial Chamber ordered the release of the defendant.²⁸⁴ The Appeals Chamber suspended this decision during its consideration of the appeal filed by the Prosecution.²⁸⁵

The second instance occurred on December 16, 2003, when the

²⁷⁹ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, at 156 (Jan. 29, 2007), available at <http://www2.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

²⁸⁰ *Id.* at 157.

²⁸¹ *Id.*

²⁸² Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01-06/1401, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (June 13, 2008), available at <http://www2.icc-cpi.int/iccdocs/doc/doc511249.pdf>.

²⁸³ *Id.* ¶ 92.

²⁸⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01-06/1418, Decision on the release of Thomas Lubanga Dyilo (July 2, 2008), available at <http://www2.icc-cpi.int/iccdocs/doc/doc522804.pdf>.

²⁸⁵ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01-06/1423, Decision on the request of the Prosecutor for suspensive effect of his appeal against the “Decision on the release of Thomas Lubanga Dyilo,” (July 7, 2008), available at <http://www2.icc-cpi.int/iccdocs/doc/doc524653.pdf> (a decision based on Article 82(3) of the Rome Statute). See also Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01-06/1444, Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the “Decision on the release of Thomas Lubanga Dyilo,” (July 22, 2008), available at <http://www2.icc-cpi.int/iccdocs/doc/doc533880.pdf>.

Government of Uganda, a State that ratified the Rome Statute on June 14, 2002, referred the situation concerning Northern Uganda to the Prosecutor of the ICC.²⁸⁶ The referral concerned atrocities allegedly committed by the Lord's Resistance Army (LRA) involving, *inter alia*, the abduction of children and their use as soldiers by the LRA.²⁸⁷

On July 28, 2004, after thorough analysis of available information, the Chief Prosecutor opened an investigation into the situation concerning Uganda.²⁸⁸ On May 6, 2005, the Prosecutor filed an application for warrants of arrest for crimes against humanity and war crimes against five senior commanders of the LRA: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.²⁸⁹ On July 8, 2005, ICC Pre-Trial Chamber II issued these arrest warrants under seal.²⁹⁰ Upon application by the Prosecutor, Pre-Trial Chamber II unsealed these arrest warrants on October 13, 2005.²⁹¹

The third occasion occurred on May 22, 2007, when the Prosecutor announced the opening of an investigation in the Central African Republic in accordance with Article 53 of the Rome Statute.²⁹² The Government of the Central African Republic, a State party to the ICC, having ratified its Statute on October 3, 2001, referred the situation to the Office of the Prosecutor on December 22, 2004.²⁹³ The Central African authorities provided

²⁸⁶ Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB; Facts and Procedure Regarding the Situation in Uganda, ICC Doc. No. ICC20051410.056.1-E (Oct. 14, 2005).

²⁸⁷ *Id.*

²⁸⁸ Press Release, ICC, Prosecutor of the International Criminal Court Opens an Investigation into Northern [sic] Uganda, ICC-OTP-20040729-65 (July 29, 2004), *available at* <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda?lan=en-GB>.

²⁸⁹ Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen, Case No. ICC-02/04-01/05 (2005), *available at* <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda?lan=en-GB>.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Press Release, ICC, Prosecutor Opens Investigation in the Central African Republic, ICC-OTP-20070522-220 (May 22, 2007), *available at* <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB>.

²⁹³ Press Release, ICC, Prosecutor Receives Referral Concerning Central African Republic, ICC-OTP-20050107-86 (Jan. 7, 2005), *available at* <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/otp%20prosecutor%20receives%20referra>

information in relation to the allegations of crimes and to proceedings held by the national judiciary.²⁹⁴ The Prosecutor has also received significant pertinent communications from nongovernmental organizations and international organizations.²⁹⁵

According to the Prosecutor, his investigation would:

focus on the most serious crimes; those were mainly committed during a peak of violence in 2002-03. There are in particular many allegations of rapes and other acts of sexual violence perpetrated against hundreds of reported victims. In parallel, the OTP will continue to monitor closely allegations of crimes committed since the end of 2005.²⁹⁶

The Prosecutor determined that according to all the information available to him, the alleged crimes, notably killings and large-scale sexual crimes, were “of sufficient gravity to warrant an investigation.”²⁹⁷ With respect to admissibility under Article 17 of the Statute, he noted that the *Cour de Cassation* of the Central African Republic had, in April 2006, indicated, “In relation to the alleged crimes the national authorities were unable to carry out the necessary criminal proceedings, in particular to collect evidence and obtain the accused.”²⁹⁸ As part of the evaluation of the interests of justice, victims confirmed that they “were awaiting the involvement of the ICC in order to see justice done and to recover their dignity.”²⁹⁹

The fourth, and most pertinent occasion to the discussion at hand, was when the United Nations Security Council addressed the situation in Darfur, which had been characterized by U.S. government officials as “genocide.”³⁰⁰

l%20concerning%20central%20african%20republic?lan=en-GB; ICC Office of the Prosecutor, Background, Situation in the Central African Republic, ICC-OTP-BN-20070522-220-A_EN (May 22, 2007).

²⁹⁴ ICC Office of the Prosecutor, Background, Situation in the Central African Republic, ICC-OTP-BN-20070522-220-A_EN (May 22, 2007).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ On July 22, 2004, both chambers of the U.S. Congress adopted concurrent resolutions “condemning the continuing atrocities in the Darfur region of western Sudan as ‘genocide’ and asking the international community to join with the United States to help bring an end to the humanitarian catastrophe that is under way there. The U.S. House of Representatives passed its version (House Concurrent Resolution 467) in a vote of 422-0, with the U. S. Senate approving its version (Senate Concurrent Resolution 133) by voice vote.” <http://usinfo.state.gov/is/Archive/2004/Jul/26-233176.html>. Both President Bush and the State Department have also “used the term ‘genocide’ to describe the situation in western Sudan.”

After UN Secretary-General Kofi Annan established an International Commission of Inquiry on Darfur in October 2004, the Commission reported to the UN in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur; the Commission recommended the situation be referred to the ICC.³⁰¹ On March 31, 2005, acting under Chapter VII of the UN Charter, the Security Council referred the situation in Darfur since, July 1, 2002, to the Prosecutor of the International Criminal Court.³⁰² The resolution required Sudan and all other parties to the conflict in Darfur to cooperate with the Court.³⁰³ It was adopted by a vote of eleven in favor with four abstentions (Algeria, Brazil, China, and the United States).³⁰⁴

After reviewing the document archive of the International Commission of Inquiry on Darfur, requesting and reviewing information from a variety of sources, and interviewing over 50 independent experts, the Chief Prosecutor, Luis Moreno-Ocampo, on June 6, 2005, concluded that the statutory requirements under Article 53 of the Rome Statute for initiating an investigation were satisfied, and decided to open an investigation into the situation in Darfur, Sudan.³⁰⁵

On February 27, 2007, the Office of the Prosecutor presented evidence to the ICC Pre-Trial Chamber, according to which Ahmad Harun and Ali Kushayb joined together to systematically pursue and attack innocent civilians. Ahmad Harun is the Sudanese Minister responsible for providing

Recently, however, United States Special Envoy to Sudan, Andrew Natsios, claimed the crisis in Darfur no longer constitutes genocide. On February 7, 2007, he stated at Georgetown University, that "[t]he term genocide is counter to the facts of what is really occurring in Darfur." Aaron Glantz, *US Slammed for Backing off 'Genocide' Charge*, (Feb. 16, 2007), available at <http://www.commondreams.org/headlines07/0216-07.htm>.

³⁰¹ U.N.Int'l Comm'n of Inquiry, *Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur*, U.N. Doc. S/2005/60 (Feb. 1, 2005).

³⁰² S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

³⁰³ S.C. Res. 1593, *supra* note 302, ¶ 2. ("Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.").

³⁰⁴ Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court, Resolution 1593 (2005) Adopted By Vote Of 11 In Favour To None Against, With 4 Abstentions (Algeria, Brazil, China, United States), U.N. Doc. SC/8351 (Mar. 31, 2005).

³⁰⁵ Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur, ICC Doc. ICC-OTP-0606-104 (June 6, 2005), available at <http://www2.icc-cpi.int/NR/exeres/6840C44E-153F-43F2-9B21-B60F4C756907.htm>.

humanitarian assistance to more than four million people in Darfur.³⁰⁶

In his former position as Minister of State for the Interior and head of the Darfur security desk, Ahmad Harun organised a system through which he recruited, funded and armed Militia/Janjaweed to supplement the Sudanese Armed Forces and then incited them to commit murder, rape, and other massive crimes against the civilian population. He was well-suited for the task, having mobilised and recruited Militia in Kordofan, South Sudan, for a counterinsurgency campaign in the 1990s. Militia/Janjaweed leader Ali Kushayb played a key role in Harun's system, personally delivering arms and leading attacks against villages. Together, Ahmad Harun and Ali Kushayb are allegedly responsible for 51 counts of war crimes and crimes against humanity.³⁰⁷

On April 27, 2007, a panel of three pre-trial judges at the International Criminal Court issued warrants for their arrest.³⁰⁸

On June 7, 2007, the ICC Chief Prosecutor appealed to the United Nations Security Council that the two accused international criminals be arrested, stating, "The Security Council and regional organizations must take the lead in calling on the Sudan to arrest the two individuals and surrender them to the Court. . . . And we count on every state to execute an arrest should either of these individuals enter their territory."³⁰⁹

As to Ahmad Harun, the prosecutor stated, "This is the same man who, in 2003, at a public meeting, declared that in being appointed to the Darfur security desk, he had been 'given all the power and authority to kill or forgive whoever in Darfur for the sake of peace and security.'³¹⁰

³⁰⁶ Press Release, ICC, Prosecutor Briefs UN Security Council, Calls for the Arrest of Ahmed Harun and Ali Kushayb for Crimes in Darfur, ICC Doc. ICC-OTP-PR-20070607-222 (July 6, 2007), available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/prosecutor%20briefs%20un%20security%20council_%20calls%20for%20the%20arrest%20of%20ahmed%20harun%20and%20ali%20kushayb%20for%20crime.

³⁰⁷ *Id.*

³⁰⁸ Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") & Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.pdf>; Prosecutor v. Ahmad Harun & Ali Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279858.pdf>.

³⁰⁹ Luis Moreno Ocampo, Special Prosecutor, ICC, Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005) (June 7, 2007), available at <http://www.amicc.org/docs/LMO%20Security%20Council%20Briefing%207%20June%202007.pdf>.

³¹⁰ *Id.*

The cooperation by the Government of Sudan has been less than forthcoming, a fact that may have enhanced the Prosecutor's action against president Omar al Bashir.

A similarity in these situations is that they were all submitted to the Court by governments from states that were willing, but unable, to prosecute offenders of the worst kind. In addition, the Prosecutor has shown a great deal of self-restraint, not having initiated any case *proprio motu*. Any fears of him politicizing his office have, as of yet, not materialized.

This may have to do with powerful antagonism from important quarters, particularly the United States. The Bush Administration fought the International Criminal Court with single-minded determination.³¹¹ The Statute was seen as an intolerable intrusion into the United States' sovereignty and fears were expressed regarding its potential political manipulation by foes of the United States, a country with many military engagements and leadership and alliance obligations throughout the world.³¹² Signed by President Clinton on the last possible day, December 31, 2000,³¹³ President Bush's point-man on the issue, Under-Secretary of State John R. Bolton declared that the United States would not ratify the Rome Statute, removing all potential legal effects of its signature under Article 18 of the Vienna Convention of the Law of Treaties (a treaty the United States has also only signed, but not ratified).³¹⁴

On August 2, 2002, Congress passed a statute entitled The American Service Members' Protection Act³¹⁵ which prohibited agencies of the U.S. Government from cooperating with the Court, denied any country that ratified the Rome Statute military assistance, and allowed the use of force to liberate U.S. citizens detained or imprisoned by or on behalf of the Court.³¹⁶ The participation of U.S. armed forces in international, particularly UN and NATO, peacekeeping operations was made dependent upon those

³¹¹ Cf. Robert C. Johansen, The Politics of Establishing the International Criminal Court: United States Opposition and International Support (Mar. 17, 2004) (unpublished paper presented at the annual meeting of the International Studies Association Convention Mar. 17-20, 2004), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/7/3/2/0/pages73200/p73200-1.php.

³¹² John R. Bolton, Senior Fellow, Am. Enter. Inst., Speech at American Enterprise Institute: American Justice and the International Criminal Court (Nov. 3, 2003), available at http://www.aei.org/publications/pubid.19407,filter.all/pub_detail.asp.

³¹³ Rome Statute of the International Criminal Court art. 125(1), July 17, 1998, U.N. Doc. 183/9, 2187 U.N.T.S. 90.

³¹⁴ For the text of the Bolton Statement and its legal effect, see W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 1320 (Foundation Press 2004).

³¹⁵ 22 U.S.C. § 7421 (2002).

³¹⁶ *Id.* §§ 7426-27.

peacekeepers being immune from the jurisdiction of the ICC.³¹⁷ Only recently, some mellowing in the U.S. stance against the ICC has been observed, when the United States let a Security Council resolution pass that referred the investigation and prosecution of international crimes committed in Darfur to the ICC.³¹⁸ The United States abstained from that vote, rather than vetoing it.³¹⁹ Since the United States had called the events happening in Darfur a genocide,³²⁰ a veto would have raised the claim for establishing another *ad hoc* tribunal along the lines of the ICTY and ICTR or a hybrid domestic-international tribunal, with all the additional expenses involved. The UN summarized the comments of the U.S. Representative to the Security Council at the meeting, Ms. Anne Woods Peterson, as follows:

While the United States believed that a better mechanism would have been a hybrid tribunal in Africa, it was important that the international community spoke with one voice in order to help promote effective accountability. The United States continued to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. Because it did not agree to a Council referral of the situation in Darfur to the Court, her country had abstained on the vote. She decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.³²¹

John Bellinger, the State Department's legal adviser, clarified that "as a matter of policy, not only do we not oppose the ICC's investigation and prosecutions in Sudan but we support its investigation and prosecution of those atrocities."³²² As to the charges brought against al Bashir, the State Department spokesperson Sean McCormack said, "[i]n our view recognition of the humanitarian disaster and the atrocities that have gone on there is a

³¹⁷ *Id.* § 7424; see generally Sean D. Murphy, *American Service Members' Protection Act*, 96 AM. J. INT'L L. 975 (2002).

³¹⁸ Press Release, Security Council, *supra* note 2.

³¹⁹ *Id.*

³²⁰ Jim Vandehei, *In Break with U.N., Bush Calls Sudan Killings Genocide*, WASH. POST, June 2, 2005, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/01/AR2005060101725.html>.

³²¹ Press Release, Security Council, *supra* note 2.

³²² *White House Ambivalent on Sudan Charges*, CBS NEWS, July 15, 2008, available at <http://www.cbsnews.com/stories/2008/07/15/world/main4261786.shtml>.

positive thing.”³²³

Unlike the practice aforementioned in the ICTY, the ICC, perhaps as a result of the paucity of cases, has not yet had to decide whether it will engage in some form of “negotiated justice.” Whether it should do so, if it can at all, is the subject of discussion in the following evaluation.

IV. APPRAISAL AND RECOMMENDATION

Can we call on plea-bargaining to play an objective role in the quest for justice, the duty to prosecute, the search for truth,³²⁴ and the thirst for accuracy in historic records with the same confidence that we appreciate it for accommodating time and financial efficiency concerns? The answer to this question is not clear.

Does plea-bargaining serve the duty to prosecute? The discussion of this issue is often very thin-skinned. Crimes such as genocide must be fully prosecuted in order to achieve both the punitive and preventive functions of justice. It is thus logical to agree with Scharf regarding the incompatibility of dropping such charges because of expediency or judicial economy.³²⁵ It is also tempting to accept Petrig’s assumption that this would run counter to the spirit of the Genocide Convention, as she argues that the duty to prosecute disallows plea bargaining in the crime of genocide.³²⁶

The ICTY case law has proven that guilty pleas are no hindrance to truth finding.³²⁷ Going a step further, admitting guilt would in a way create a legacy of accepting the history from both sides of the conflict. In contrast, an innocent claimant found guilty by the court might raise doubts to the verity of facts and the supporting evidence, just as it would trouble the conscience of the court in a case of a convicted innocent.

What charges are bargained for the most? As seen in the previous sections, the records of the ICTY and ICTR indicate that charges on

³²³ *Id.*

³²⁴ As articulated by Mrs. Albright before the United Nations, “[t]ruth is the cornerstone of the rule of law . . . and it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.” U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/PV.3217 (May 25, 1993) (statement by Madeleine Albright, U.S. Rep.).

³²⁵ Scharf, *supra* note 121, at 1075.

³²⁶ In her discussion, Ms. Petrig argues that the duty to prosecute disallows plea bargaining in the crime of genocide, just as she questions charge bargaining in face of the duty to prosecute taking into account the totality of the criminal conduct. *See* Petrig, *supra* note 109, at 18-21.

³²⁷ *See* Prosecutor v. Sikirica et al., Case No. IT-95-8-S, Sentencing judgment, ¶ 149 (Nov. 13, 2001), available at <http://www.icty.org/x/cases/sikirica/tjug/en/sik-ts011113e.pdf>. *See also* Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing judgment, ¶¶ 72-76 (Dec. 2, 2003), available at <http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf>. *But cf.* Nikolić, Case No. IT-02-60/1-S, Sentencing judgment, ¶ 63.

genocide are the ones that tend to be dropped. It is clear why the defendant goes for this choice: genocide is the highest in the hierarchy of atrocious crimes, the “crime of crimes.”³²⁸ There is, however, an explanation as to the prosecutors’ agreements to such pleas: genocide is an international crime that brings the highest challenge in proving beyond a reasonable doubt the specific intent to commit such a heinous act.³²⁹ Thus, the Prosecutor and the defense alike have an interest in considering charge bargaining with regard to the crime of genocide.

Victims’ sensitivities are another issue considered when plea bargaining comes to play. Victims feel vindicated when the perpetrators are punished openly and their voices are heard.³³⁰ Plea bargaining happens behind closed doors, always with a sense of mystery as to how the result came about. This secrecy seems to go against the interest of the victim. Simultaneously, victims are spared the trauma and the adversarial ordeal of testifying, as well as the anguish of potential retaliation.³³¹ This concern is particularly present in genocide cases, as the communities enveloped in conflict have often tended to be small communities where people know each other.

Asking for a plea of guilt is not totally without risk. The balancing of interests in a case such as al Bashir’s is not an easy task to accomplish. What if, after a plea with al Bashir, the ICC deems it necessary to refer to the statute and Article 65(4),³³² as a need to accommodate the interests of victims? At this point, it can only be hoped that the Court would consider the interests of peace by resorting to subparagraph (a), which requires the Prosecutor to present additional evidence, rather than (b), which considers an admission of guilt as not having been made. However, this has not been the case in the tribunals discussed above.

³²⁸ Cf. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (Cambridge Univ. Press 2000).

³²⁹ A very good discussion on this issue can be found in Milanovic, *supra* note 10.

³³⁰ *Nikolić*, Case No. IT-02-60/1-S, Sentencing judgment, ¶ 62.

³³¹ *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing judgment, ¶¶ 66, 68 (Feb. 27, 2003), available at <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>. Michael Bohlander, *Plea-Bargaining before the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 151, 161 (Richard May et al. eds., 2001).

³³² Article 65 (4) provides: “Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.” Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. 183/9, 2187 U.N.T.S. 90.

Plea bargaining accommodates Judge Cassese's objection³³³ to granting immunity for those who offer substantial cooperation, while still creating the opportunity for the prosecution to avail itself of useful information offered through the defendant's admission of guilt and the resulting bargaining. Depending on the terms of the agreement, the plea bargaining does not, by default, provide immunity from prosecution.

The economic issues cannot be neglected. Rather, the complicated system of financing of international courts makes it a necessity to address economic issues, as Judge McDonald noted, in a joint separate opinion in *Erdemović*:

The concept of the guilty plea *per se* is the peculiar product of the adversarial system of the common law which recognizes the advantage it provides to the public in minimizing costs, in the saving of court time. . . . This common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.³³⁴

Plea-bargaining shortens the process of achieving a verdict and imposing a sentence, while not interfering with the court's duty to establish the credibility of the confession, as corroborated by the evidence. Examples both in the text of the rules, as well as in the proceedings of the courts, have shown that this system is functioning well. Plea-bargaining rightly deserves to be more than "simply part of the evidence to be considered and evaluated

³³³ Judge Cassese, in the name of the Court, had objected to a proposal made by the United States during negotiation of the Rules of Procedure for the International Criminal Tribunal for the former Yugoslavia (ICTY), according to which perpetrators of low-level crimes could be granted immunity if cooperating substantially. See *United States proposed Rules of Procedure for the ICTY*, in 2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 509, 560 (V. Morris & M.P. Scharf eds., 1995). Addressing this issue in a statement to members of diplomatic missions, Judge Cassese, on behalf of the ICTY judges, had noted, "The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be." See *United Nations, Statement by the President made at a briefing to members of diplomatic missions*, U.N. Doc. IT/29, at 5 (1994), reprinted in 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 112 (V. Morris & M.P. Scharf eds., 1995).

³³⁴ Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald & Judge Vohrah, ¶ 2 (Oct. 7, 1997), available at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

by the court.”³³⁵ In many cases, it has proven to be an institution of effective prosecution, and a legal solution before a court of law.

As Thaman would argue, plea-bargaining appears to accommodate concerns for social peace and prevention of political unrest. It can achieve justice and establish truth through admissions of guilt that lead to the punishment of the confessing perpetrator of crimes.³³⁶ The moral inconvenience of admitting guilt only because of the benefit awarded gets smoothed out by Damaška, who sees more to such a confession. He notes that admitting guilt in exchange for a reduced sentence might not only have this beneficial impact for the defendant, but “[i]f his self-incrimination appears to be motivated by a change of heart rather than by personal risk calculations, then his self-condemnation can exert a strong effect on his followers, making them more likely to confront the reprehensible nature of their own conduct.”³³⁷

In most countries, forms of plea-bargaining apply to less serious felonies. However, international criminal tribunals deal with the most serious of crimes. Opponents of plea-bargaining in international criminal courts perceive the plea-bargaining system as one promoting an unbalanced leniency in sentencing, in relation to the severity of the crimes under their jurisdiction, and, thus, find plea-bargaining to be unacceptable.³³⁸ However, through bargaining, there will at least be a conviction, achieving accountability for the crime by the perpetrator. This ends the impunity sooner rather than later, even if the accused is the head of state, which in many cases could end in impunity for quite a long time, as in the case of Chilean President Pinochet. Other high-end figures, such as Radovan Karadžić, spent years in hiding, comfortably escaping justice, before they were delivered to the Court. In the worst of cases, the real butchers, such as Ratko Mladić or Johnny Paul Koroma,³³⁹ are still indictees at large with no prospect as to when, if ever, they will come before a court.

Others are worried about the opprobrium that normally accompanies a full trial.³⁴⁰ The public stigma in such cases already exists, stemming from a leader stepping down from high office due to an indictment, and then receiving punishment resulting from confessing to having committed such heinous acts. The victims are looking for justice, and justice is rendered once the perpetrator is convicted.

³³⁵ *Erdemović*, Case No. IT-96-22-A, Separate and dissenting opinion of Judge Cassese, ¶ 7, available at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>.

³³⁶ Thaman, *supra* note 94, pt. 2.

³³⁷ Mirjan Damaška, *Negotiated Justice in International Courts*, 2 J. INT’L CRIM. JUST. 1018, 1031 (2004).

³³⁸ Cook, *supra* note 124, at 476.

³³⁹ Petrig, *supra* note 109, at 22-23.

³⁴⁰ *Id.*

Those who oppose the powerful plea-bargaining system in the United States find the power of justice concentrated in the office of the prosecutor. Langbein expresses his disapproval of the tendency that the “accusatory, decisional, and sentencing phases of procedure” rest “in a single official, the prosecutor.”³⁴¹ This happens because there is a wide range between maximum and minimum punishments. In addition, judges have only limited discretion in sentencing, due to sentencing guidelines in federal courts, as well as in some state courts. In the case of international criminal courts, this might not be a problem, because there are no guidelines imposed on sentencing. On the contrary, the judges are not bound at all by any agreement between the parties,³⁴² and judges are the ones who control the eventual decision.³⁴³ This element of the civil law system in the hybrid plea rule of international criminal procedure, while accommodating critics of pleas,³⁴⁴ could potentially discourage forthcoming defendants. On the other hand, in the face of these serious crimes, the community and the victims would rather have the prosecutor’s side outweigh the defendant’s.

Concerns with respect to the legality principle are diminished by the fact that the courts can only deal with a small number of cases, and not necessarily from both sides of the conflict. Plea-bargaining creates the terrain for more cases to be solved and, consequently, for more victims to be acknowledged. After-war perceptions in the torn communities regarding trials are most of the time radically different.³⁴⁵ All parties maintain that

³⁴¹ J. H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 18 (1978).

³⁴² Note that Professor Schabas had called “totally superfluous” the insertion of paragraph 5 in Rule 65 of the ICC. The paragraph reassures that plea negotiations are not compelling on the court. See SCHABAS, ICC, *supra* note 228, at 150. However, others have claimed that it might be a necessity. See Petrig, *supra* note 109, at 10.

³⁴³ Recall the ICTR and its judgment on *Kambanda*, *supra* note 190, or the ICTY in several cases discussed above.

³⁴⁴ The tensions between civil law and common law traditions on pleas during the discussions on the Rome Statute were such that the term “plea” per se was avoided in the text of Article 65, though of course “proceedings on an admission of guilt,” as the article is named, are nevertheless guilty plea proceedings. Rome Statute, July 17, 1998, U.N. Doc. 183/9, 2187 U.N.T.S. 90.

³⁴⁵ See generally Dan Saxon, *Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia*, 4 J. HUM. RTS. 559-72 (2005). See also Outreach Activities Archive of the ICTY (discussing the ICTY’s achievements), available at <http://www.icty.org/sid/8938> (last visited May 1, 2009). For instance, it is reported that at the event organized on December 13, 2007, in Zagreb, Croatia, representatives of victims’ and war veterans’ associations mainly criticized the so-called “Vukovar Three” (Mrksic et. al.) judgment and the Tribunal’s failure to indict the Yugoslav Army leadership, complaining that justice rendered partially was no justice. *Id.* In roundtables organized on November 23-26, 2007, at the law school of Zenica-Banja Luka, Bosnia and Herzegovina, the ICTY representative had to dispel misperceptions about the Tribunal. *Id.* In October to December 2007, in various locations in Bosnia and Herzegovina it

they are the ones most harmed by the conflict. In all conflicts, there are victims on both sides. The numbers may vary, but the grief and suffering of each victim is a stand-alone issue. Reality tells us that there is little or no chance that in such huge atrocities the international criminal system will be able to satisfy the just demands of all victims. In all circumstances, there will be many who will not have their day in court. Consequently, plea-bargaining is not doing an insurmountably great injustice.

The victims of both sides of the conflict would say that there is not enough justice done, that many more perpetrators are at large, and, in many cases, that they are not happy with the outcome, whatever it might be.³⁴⁶ Mending the wounds of such conflicts will last longer than the life of a set of prosecutions.

CONCLUSION

Anyone aware of the horrible events in Darfur, and familiar with the system of international criminal justice, would be tempted to provide a visceral response to the question of how to deal with al Bashir: bring him before the ICC and give him a full trial for the atrocities committed in Sudan. This paper, however, has considered the alternative institution of plea-bargaining as a realistic option for solving cases such as the one at hand. Despite the Pre-Trial Chamber's arrest warrant and confirmation of most charges, at this moment, there is not much evidence that could lead us to believe that al Bashir will be brought to trial anytime soon³⁴⁷ or that he will follow the Haradinaj precedent and submit himself voluntarily to the jurisdiction of the Court. *Mutatis mutandis*, the concern that Sudan, the largest nation in the African Continent, might risk partition, augmented by the fear of the collapse of a fragile peace process, creates a situation where a potential plea-bargain should be an option under consideration.

At this point, we are not in a position to assess the weight of the Prosecutor's factual basis and evidence against al Bashir, as we do not have access to this information. However, if there is even a slight chance of al Bashir escaping from the jurisdiction of the Court, or still worse, a

was confirmed that divisions among Bosniaks, Serbs and Croats in their perceptions of the past events exist. *Id.* In Sarajevo, the event regarding the ICTY website in the region was negatively influenced by a hostile intervention by Branimir Stokich, the head of the RS Association of Camp Inmates. See Latest Outreach Activities of the ICTY, <http://www.icty.org/sid/8937> (last visited May 1, 2009).

³⁴⁶ On the opposite side of the argument, a discussion on the issue that severity of the sentence matters to the victims, can be found in Petrig, *supra* note 109, at 22-23.

³⁴⁷ Actually, al Bashir is even traveling freely in defiance of the arrest warrant. See Tesfalem Tekle, *Sudanese President to Visit Ethiopia Next Week*, SUDAN TRIB., Apr. 19, 2009, available at <http://www.sudantribune.com/spip.php?article30916>.

possibility of his acquittal, it may not be worth taking the risk of a full trial. When such uncertain prospects are at play, proportionally higher concessions might not necessarily be a judicial sin, notwithstanding the concerns of those who, as a matter of principle, reject plea bargaining as an alternative procedure for those accused of egregious crimes prosecuted by courts like the ICC.³⁴⁸ Prosecuting the most atrocious crimes and concentrating on “main perpetrators and architects” is not necessarily the best alternative *vis-à-vis* prosecuting more of the high-, middle- and low-level perpetrators via guilty plea agreements. The latter would serve the cause of justice in greater numbers and ensure accountability for all those involved, from the brain that produced the strategy for heinous crime, to the limbs who directly and willfully perpetrated the atrocity.

When dealing with sitting heads of state, any legal avenues must take into consideration the large political consequences, such as the “nightmare scenario,”³⁴⁹ of destabilizing large areas of the African continent. The policy-makers should be thinking twice before taking any further steps. The Security Council could apply pressure to Sudan to cooperate in arresting the two previously accused individuals and surrendering them to the Court, while simultaneously starting domestic proceedings against many other perpetrators. Under these conditions, the UN SC could still invoke Article 16 of the Rome Statute, even after the investigation or prosecution commences, and grant the one-year period of stay of investigation, with the possibility of renewal. After all, the nine votes needed in the Security Council might not be too hard to secure, as the risk of a veto has probably diminished with the Obama administration and its wholesale review of foreign policy.³⁵⁰

Additionally, the warrant of arrest issued by the Pre-Trial Chamber has already had a devastating impact on Darfur. The subsequent retaliation of Sudan by expelling non-governmental organizations has paralyzed the

³⁴⁸ Cf. Carla del Ponte, Prosecutor, ICTY, Address: Four Years in the Hague: A Retrospective and the Way Forward (Oct. 2, 2003), available at http://www.ngiz.nl/events/archive/files/20031002_ngiz_delponte.pdf. In this address the former ICTY Prosecutor describes such concern, but also concludes that the balance struck in procedural innovations of guilty pleas and plea bargaining “is a healthy one” and also “a model” to be followed in the future. *Id.* at 8-9.

³⁴⁹ See William Wallis & Andrew England, *Bashir Rallies Forces to Fight Warrant*, FIN. TIMES, Mar. 19, 2009, available at http://www.ft.com/cms/s/0/dacf8fc2-14af-11de-8cd1-0000779fd2ac.html?ncklick_check=1, quoting Meles Zenawi, Ethiopia's prime minister, who was concerned that the court's decision risked creating an “arc of instability” round Ethiopia, from Somalia to its south and east, hostile Eritrea to the north and Sudan to the west. *Id.*

³⁵⁰ See analysis of this issue by Paul Stares & Alexander Noyes, *Think Twice on Bashir*, NEWSWEEK, Mar. 5, 2009, <http://www.newsweek.com/id/187870?tid=relatedcl>, particularly concerned about failure of the 2005 Comprehensive Peace Agreement (CPA) between northern and southern Sudan, which ended a twenty-year civil war.

United Nations humanitarian efforts in Sudan to ensure food, shelter, and protection needs of 4.7 million people who rely on foreign assistance.³⁵¹ There has been an escalating increase of insecurity through the kidnappings of aid workers in Sudan,³⁵² threats of radical groups to conduct bombing campaigns across Europe and the United States,³⁵³ the call of Al-Qaeda to undertake *jihad* against the “crusade” of the West against Sudan,³⁵⁴ a stalled peace process, and the 2009 elections far behind schedule,³⁵⁵ adding to an increasingly ominous situation reigning in Sudan.

On the other side of the aisle, al Bashir cannot feel comfortable either; he is already sitting between the rock of his destiny “to face justice,”³⁵⁶ and the hard place of the gnawing internal conflict. It would be myopic on his part to completely brush off the potentiality of a change of government; he has many enemies inside and outside of Sudan. A new government that could ask for his trial in Sudan would have primary jurisdiction. The trial standards, and due process rights in such a hypothetical trial in Sudan, might not necessarily be the ones observed by the ICC.³⁵⁷

This murky situation on both sides leads to the suggestion of a possibly more fruitful way to proceed, *i.e.* that the Office of the Prosecutor and the

³⁵¹ See Laura McInnis, *UN Says Paralyzed in Sudan Without Partners*, REUTERS, Mar. 10, 2009, available at <http://www.alertnet.org/thenews/newsdesk/LA926475.htm>. Elisabeth Byrs, spokeswoman for the U.N. Office for the Coordination of Humanitarian Affairs noted that “some 1.5 million people in Darfur will lack health care, 1.6 million will lose safe drinking water and hygiene services, and hundreds of thousands will risk inadequate shelter and other problems with the coming onset of Sudan’s rainy season.” *Id.* Concerns also arise regarding fair and even distribution of food by the World Food Program now that it is the government who is taking charge of handling humanitarian aid. *Id.*

³⁵² See Daniel Leblanc, *Release of Aid Workers Prompts Calls for Action on Darfur*, GLOBE & MAIL, Mar. 16, 2009, available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20090316.wreleased16/BNStory/International/home>.

³⁵³ Wallis & England, *supra* note 349.

³⁵⁴ See Neil McFarquhar, *U.N. Official Calls Darfur Aid Tenuous*, N.Y. TIMES, Mar. 29, 2009, at A12, available at http://www.nytimes.com/2009/03/25/world/africa/25sudan.html?_r=1&ref=world.

³⁵⁵ For the importance of these elections to the peace process see Kelly Campbell & Dorina Bekoe, *Sudan’s 2009 Elections: Critical Issues and Timelines*, U. S. INST. OF PEACE (August 2007), available at http://www.usip.org/pubs/usipeace_briefings/2007/0824_sudan_elections.html. A current account on these elections is found in Steve Paterno, *Sudan Elections: Rough Road Ahead*, SUDAN TRIB., Apr. 6, 2009, available at <http://www.sudantribune.com/spip.php?article30916>.

³⁵⁶ See Arlene Getz, *Rocking The Courtroom, The ICC prosecutor on His Work, Human Rights and Sudan*, NEWSWEEK, Mar. 21, 2009, <http://www.newsweek.com/id/190392/page/1>.

³⁵⁷ See comments of the war crimes investigator Tom Parker, in his interview with Newsweek, in Travis Wentworth, *A Tremendous Day for International Justice: How the International Court Pieced Together its Case Against Sudan’s Bashir*, NEWSWEEK, July 18, 2008, <http://www.newsweek.com/id/147615/page/2>.

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lawyers for al Bashir enter into negotiations for a potential surrender of al Bashir to the Court, in close cooperation with the Prosecutor. The details would be left to the negotiators. Al Bashir's stepping down from the office of the President of Sudan, and his pleading guilty to charges acceptable to both sides, would arguably properly acknowledge the victims' wounds, contribute to the healing of the country, and bring an end to the quagmire that al Bashir's prosecution has become. The ICTY and the ICTR boldly experimented to make the most out of a shy procedural provision. The ICC, should learn from its forerunners' mistakes, build on their best experiences, and look for creative solutions in cases whose ends seem far beyond the horizon.